91-1900

In the Supreme Court of the United States

October Term 1992

No. ____

Supreme Court, U.S.
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ROBERT ALEXANDER,

Petitioner,

-v-

CITY OF MENLO PARK,
MIKE BEDWELL,
Manager of City
of Menlo Park,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Submitted By

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I. QUESTIONS PRESENTED.

1. Was plaintiff's termination a proper one, or was he terminated without being afforded certain entitlements arising out of the personnel rules without due process?

2. Did the Court err in cutting off plaintiff's economic loss as of the date he voluntarily resigned (albeit for good cause--health reasons) from a subsequently obtained job?

3. Did the Court err in refusing to order reinstatement, front pay in lieu of reinstatement, vocational rehabilitation, and/or any other type of equitable relief to plaintiff?

4. If an employee loses his employment because of a denial of due process, under what circumstances is he entitled to receive emotional distress damages to compensate him for (a) the emotional distress he suffered as a result of the loss of his employment, (b) the emotional distress he suffered as a result of the publicity arising out of the employment dispute and (c) the emotional distress arising out of his attempt to seek legal redress of the

violation of his due process rights?

5. What computational methodology should be used to determine prejudgment interest owing on economic loss in a 42 U.S.C. Section 1983 case?

6. Did plaintiff abandon his right to seek punitive damages against the City Manager, and was he entitled to receive them?

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Petitioner, Robert Alexander, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed on December 13, 1992, with rehearing denied on February 25, 1992.

OPINIONS BELOW

The Court of Appeals' last opinion in this case (unpublished), hereinafter referred to as "Alexander II", was filed on December 13, 1991. The Order overruling petitioner's Petition for Rehearing was filed on February 25, 1992. (See Appendix.)

The first Court of Appeals' opinion in this case, was published as Alexander v. City of Menlo Park, 787 F.2d 1371 (9th Cir. 1986), cert. den. 479 U.S. 1032, 107 S.Ct. 879, 93 L.Ed.2d 833 (1987), and is hereinafter referred to as "Alexander I".

Opinions of the trial court prior to the first appeal and remand order were: 1) Decision filed July 23, 1982; 2) Judgment entered July 28, 1982; 3) Memorandum of Decision dated July 28, 1983; 4) Judgment entered June 14, 1984.

Opinions of the trial court after the first appeal and remand were: 1) Order filed September 13, 1988; 2) Memorandum of Decision filed August 2, 1989; 3) Judgment entered August 4, 1989; 4) Findings of Fact and Conclusions of Law filed March 29, 1989; 5) Judgment Amending Judgment Entered August 4, 1989, filed April 25, 1989; 6) Findings of Fact Amending Findings Filed March 29, 1990, filed May 7, 1990; 7) Amended Findings of Fact and Conclusions of Law filed July 20, 1990; 8) Amended Order filed August 1, 1990. (See Appendix.)

JURISDICTION

The opinion of the Court of Appeals was entered December 13, 1991. A timely petition for rehearing was denied on February 24, 1992. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS

The statutes involved are 42 U.S.C. Section 1983 and 28 U.S.C. Section 1961. The Constitutional provision involved is the Due Process Clause. The regulations involved are pertinent rules contained in the Personnel Rules

of Menlo Park. (See appendix.)

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Plaintiff, an African-American citizen of the United States, veteran of the armed services, and holder of a master's degree from San Francisco State University, worked for the City of Menlo Park, California, between November 1974 and August 5, 1979. Between November 1974 and February 1979 he held the position of Youth Services Facility Director. He passed his probationary period on May 7, 1975, and thereafter throughout the rest of his employment had permanent employment status.

He performed the duties of Youth Services Facility Director in an excellent fashion, receiving repeated raises, upward classification to classification 39.5, and favorable evaluations from his supervisors and the City Manager, Michael Bedwell.

Effective February 9, 1979, the City of Menlo Park promoted plaintiff to Recreation Supervisor II, after abolishing his Youth Services Facility Director position. He was put

in a six-month probationary promotional status in the new position, but retained permanent employment status and retreat, bumping, and re-employment rights in the event he did not pass the probationary period of the promotional position.

On July 9, 1979, plaintiff's supervisor, Mary Leydon, recommended to City Manager Bedwell that plaintiff be terminated from the probationary promotional position. She wrote, "At this point, I think it would be best to terminate Robert from this position, and lay him off under the Personnel Rules which apply to bumping, since there are no other jobs in this department that are available to him. As a department head, I will not go to any special lengths to 'save' him and bump another employee." Leydon's recommendation to lay plaintiff off and disregard his bumping rights (which she admitted in testimony she knew he had) followed a noticeable cooling in the relationship between Leydon (a Caucasian) and plaintiff after plaintiff had opposed provisions in a proposed affirmative action plan (drafted

by Leydon), which stated there was an overutilization of Black males in the workforce.

Plaintiff was immediately suspended with pay, and on July 30, 1979, City Manager Bedwell wrote plaintiff and informed him, "Your position as Recreation Supervisor II is terminated as of August 5, 1979, and until that time you will be suspended without pay."

Plaintiff was denied his retreat rights, bumping rights, and re-employment preference eligibility list rights despite the clear requirement in Menlo Park's rules requiring such rights be offered a promotional probationary employee of permanent status. Instead of giving plaintiff these rights, plaintiff was terminated August 5, 1979 from his employment in toto with Menlo Park. Plaintiff was given no explanation for being terminated from Menlo Park employment in toto; nor was he given any explanation for not being afforded retreat rights, bumping rights, and re-employment rights; nor was he given any opportunity to have a hearing to address these issues. Plaintiff previously had repeatedly inquired about his bumping rights and

hearing rights to no avail.

At trial, City Manager Bedwell admitted he had intentionally denied plaintiff his entitlement to bumping rights, and that the City had disregarded the requirement of putting plaintiff on a re-employment eligibility list.

The evidence both before and after remand established that plaintiff was a highly qualified employee, who should have been given bumping rights, and who would have been eligible for priority placement if he had been put on the re-employment eligibility list. The positions plaintiff would have been eligible for if he had been put on the re-employment eligibility list would have included the position of Human Services Coordinator which became available in May 1980. Under Rule X's re-employment preference eligibility list requirement, plaintiff should have been hired for any position opening up in the ensuing two years after being laid off for which he was qualified (including Human Services Coordinator).

In addition to denying plaintiff his bumping rights and re-employment preference

eligibility list rights (Rule X, Section 3(D), 3(E), 3(F), and 3(G), the City of Menlo Park violated numerous other personnel rules in effectuating the termination of plaintiff from both his promotional probationary position and from his permanent employment status with the City of Menlo Park, including as follows: 1) Rule V, Section 1--not attempting to secure the most effective adjustment of plaintiff to the probationary promotional position of Recreation Superviosr II; 2) Rule V, Section 2--failure to give plaintiff a full six month's probationary period in the new position, and failure to extend plaintiff's probationary period as Recreation Supervisor II an additional six months, despite "good cause" for such extension as defined in the rule; 3) Rule V, Section 4--failure to notify plaintiff of the specific reasons he had been rejected for the permanent position of Recreation Supervisor II, and failure to return plaintiff to his prior classification and non-probationary status in that classification; 4) Rule X, Section 2 and Rule XI, Sections 1 and 2--failure to follow

correct procedures for discharging plaintiff from employment in toto with the City; 5) Rule X, Section 3(E)--failure to retain plaintiff in the highest position possible after deciding his promotional probationary position would not work out; 6) Rule X, Section 3(G)--failure to pay plaintiff two weeks severance pay; 7) Rule VII, Section 1--failure to adequately train plaintiff in the promotional probationary position of Recreation Supervisor II; and 8) Rule VIII, Section 3--failure to give plaintiff any performance appraisals after 1977 (including none in his probationary period).

After being terminated plaintiff diligently looked for alternative work. He remained unemployed from August 1979 to April 1, 1983. Between April 1, 1983 and March 1984 he worked as Superintendent of Ravenswood Parks and Recreation District, which evolved into being Director of Parks and Recreation for the City of East Palo Alto.

In March 1984, plaintiff resigned his East Palo Alto Director position, based on extreme distress he was suffering. Unrebutted expert

testimony from a psychiatrist and psychologist established plaintiff has suffered ongoing severe emotional distress, partial disability, and post-traumatic stress syndrome arising out of the denial of his due process rights, which distress continues up through the present time.

The unrebutted testimony was that plaintiff's distress was exacerbated by newspaper publicity about the litigation and about his involuntary separation from Menlo Park employment, and by repeated interaction with the City of Menlo Park in his East Palo Alto director job (a requirement of the job), revivifying the original trauma, and leading him to resign from the East Palo Alto Director job.

After leaving the East Palo Alto Director job plaintiff worked on an independent contractor consultant assignment for East Palo Alto for a pre-set specified time period between July 1984 and the end of 1984. This assignment did not require close interaction with Menlo Park officials. The only work plaintiff has had between the end of 1984 and the present was some independent contracting work he did for Bayshore

Employment Services in 1986.

II. PROCEDURAL HISTORY AND DECISIONS IN CASE

After the first trial in this case, the trial court on July 23, 1982, granted plaintiff relief under 42 U.S.C. Section 1983, holding that, "plaintiff was denied procedural due process of law...because the defendant failed to accord him all that was due him" under the personnel rules. (Para. 9.) It ruled that when plaintiff was terminated from his promotional probationary position under City rules he "...had a right to be returned to classification 39.5 (his previous classification when he was Youth Services Facility Director), and if there was no available job for which plaintiff was qualified within that classification he should have been accorded the benefits of Rule X, as a permanent employee." (Para. 12.) Rule X covers rights for employees designated for layoff and for permanent employees retreating from promotional probationary positions, and addresses bumping rights and re-employment preference rights. (See Rule X in appendix.) The trial court entered judgment in favor of

plaintiff for back pay, based on the denial of bumping rights, in the amount of $11,114.03. (Judgment entered 7-28-82.)

Thereafter, the trial court vacated its damage award, held a new trial on damages, and then issued a memorandum of decision on July 28, 1983, reducing the dammage award to one dollar ($1.00). The Court held that plaintiff had suffered no "compensable injury", because he had not proven by a preponderance of the evidence he would have accepted the position of Gym Director or Night Clerk (positions the trial court had found he was entitled to bump into) if either position had been offered him in August 1979. (Memorandum of Decision, July 28, 1983.)

On appeal, in Alexander I, supra, the Ninth Circuit held that the trial court had improperly imposed the burden of proof on plaintiff on the issue of whether he would have accepted the bumped position instead of on the defendants. It also held that it was error to omit making any finding as to whether plaintiff had suffered emotional distress as a result of the denial of his due process rights.

In its opinion, the Ninth Circuit stated that, "The injury suffered by plaintiff was unemployment", and that plaintiff had a constitutionally protected property interest. The Ninth Circuit held that the weight of this property interest was "substantial--Alexander's opportunity to continue his employment, maintain his income, and protect his reputation." (Alexander I, supra, 787 F.2d at 1374.)

After remand, the trial court held additional trial proceedings, in which a significant amount of additional testimony was taken, and additional exhibits were admitted.

On September 13, 1988, the trial court issued an interim order. It stated, "The issues tried are (1) whether defendants sustained their burden of proof that plaintiff incurred no injury proximately resulting from a violation by defendant of his due process rights, and (2) whether plaintiff suffered emotional distress as a result of the denial of defendants of his due process rights?" The Court concluded, "Plaintiff is entitled to prevail upon both issues."

After hearing additional evidence on damages, the Court, on August 2, 1989, issued a memorandum awarding plaintiff $44,551 salary loss, $100,000 emotional distress damages, $3,684.00 for therapy bills, and $10,000 for vocational training. On August 4, 1989, judgment was entered for $158,236.41.

On March 29, 1990, the Court amended its judgment and issued findings of fact and conclusions of law. On April 25, 1990, the Court issued an amended judgment, and on May 7, 1990, filed findings of fact amending the March 29 findings. On July 20, 1990, the Court issued its final amended findings of fact and conclusions of law; and on August 1, 1990 it issued an order affirming its April 25, 1990 judgment as the final judgment. (See appendix.)

In its final amended findings of fact, the Court held that, "Plaintiff's claim for damages now before the court does not arise from wrongful termination of plaintiff's employment with defendant. It has been previously determined that plaintiff's termination from employment was not wrongful. [Decision of July

23, 1982; Alexander v. Menlo Park, 787 F.2d 1371.]" (7-20-90 amended findings, 3:10-14.)

The Court failed to explain how it concluded plaintiff had not suffered "wrongful termination", but had suffered wrongful denial of bumping rights which, if accorded to him, would have resulted in him not being terminated from his employment.

In its final amended findings, the Court awarded plaintiff $52,120 salary and fringe benefit loss at Gym Director level for the period August 1, 1979 through March 31, 1983, $55,282 prejudgment interest thereon, $10,000 emotional distress damages, $4,114.53 for past medical and psychological bills, and $960.00 for future medical and psychological bills. The Court did not award any vocational training money or reinstatement or front pay. (7-20-90 findings, finding no. 7.)

The total final judgment came to $122,476.53, plus attorneys' fees and costs. (April 25, 1990 judgment amending judgment.)

The trial court cut off plaintiff's economic loss at March 31, 1983, based on its

view that "Plaintiff's unemployment and alleged wage losses after March 31, 1983 were not caused by and did not proximately result from the denial of bumping rights or other act of defendant, but rather from plaintiff's voluntary resignation from his East Palo Alto job"). (7-20-90 amended findings, finding no. 9.) The trial court concluded in its amended findings that plaintiff resigned the Ravenswood/East Palo Alto job because of (1) "a decision of this court" (the August 1989 memorandum had stated "because he was overwhelmed by a decision of this court which awarded him token damages of $1.00"), and (2) "plaintiff's inability to tolerate contact with officials of defendant City (of Menlo Park), as he was required to do in the Ravenswood job" (the August 1989 memorandum had explained that, "His reason for resigning was that his post brought him into contact with City of Menlo Park personnel, which reminded him of his denial of due process by the City of Menlo Park."). (7-20-90 amended findings, finding no. 24; August 1989 memo., 3:7-16.)

The trial court made no finding whether plaintiff had good cause to resign the East Palo Alto director job or not. The unrebutted expert testimony was that the severe distress plaintiff was experiencing at the time mandated he resign from the Ravenswood/East Palo Alto job. The Court's memoranda and findings--indicating plaintiff's inability to tolerate contact with officials of Menlo Park as required by his East Palo Alto job and his being overwhelmed by the $1.00 decision as being the factors causing him to resign--implicitly accepts this view that severe emotional distress caused him to resign from the East Palo Alto job.

In its March 1990 and July 1990 amended findings, the trial court reduced its previous August 1989 award of $100,000 damages for emotional distress to $10,000, based on its view that 10% of plaintiff's $100,000 of emotional distreess was from "loss of bumping rights", 60% was from "termination of employment" with Menlo Park, and 30% was from "reaction to publicity and judicial decisions" pertaining to his employment dispute with Menlo Park. The trial

court held that only the 10% ascribed to "loss of bumping rights" was compensable, based on proximate cause principles. (7-20-90 amended findings, findings 26-33.)

In its March 29, 1990 findings the trial court found that plaintiff had been denied his right to be put on a re-employment preference eligibility list, although it stated he had not proved he had been damaged therefrom. (Findings 5,6,7.) By amendment, on May 3, 1990, the trial court deleted all findings on the re-employment preference list issue, without stating its reasons therefor, and its July 1990 amended findings reflected the deletion.

The trial court also found in its final March 1990 and July 1990 findings that plaintiff was not entitled to reinstatement/front pay/vocational training, holding that his right to reinstatement/front pay/vocational training had been cut off based on his resigning the East Palo Alto job in 1984. This finding was a reversal from its August 1989 memorandum of opinion which had awarded $10,000 for vocational training "in lieu of reinstatement". (See 7-20-

90 amended findings, conclusion of law no. 14.)

The Court of Appeals for the Ninth Circuit issued its unpublished decision on December 13, 1991. The Court affirmed the trial court's judgment. It held that plaintiff's resignation from his subsequent job was "causally unrelated to the failure to offer Alexander bumping rights", although it was causally related to Alexander's termination from employment by Menlo Park. However, it held that because Menlo Park's termination of him was a "proper termination", economic loss occurring after his resignation from the East Palo Alto Director job (although causally related to his termination by Menlo Park) was not recoverable.

The Court of Appeals also affirmed the trial court's decision and reasoning with regard to reducing the emotional distress award from $100,000 to $10,000.

The Court of Appeals also ruled that plaintiff had "abandoned' his claim to the re-employment eligibility list, even though plaintiff had raised the issue in his complaint, in the trial before the first appeal, in the

first appeal, at the evidentiary hearings after the first appeal, and in the second appeal, and even though the trial judge had taken considerable evidence on it and made a finding on it after the second appeal before deleting the finding.

The Court of Appeals also affirmed the trial court's denial of reinstatement and vocational rehabilitation relief, holding that plaintiff had not raised these issues in the first appeal, and had accordingly abandoned them, even though the trial court after remand after the first appeal, upon re-trial, had made findings of fact and conclusions of law on the issues, and had taken considerable new evidence germane to said issues. The Court of Appeals ignored, as well, the fact that reinstatement and other equitable remedies had become very germane in the intervening period between the first appeal and second appeal because plaintiff had experienced considerable unemployment during that period of time.

The Court of Appeals also affirmed the award of prejudgment interest the trial court

had made, indicating that the trial court had not abused its discretion in using a rate lower than the 28 U.S.C. Section 1961 methodology used for post-judgment interest computations.

As for punitive damages, the Court of Appeal ruled that judgment was initially rendered only against the City of Menlo Park and not against Mike Bedwell. It stated that this aspect of the judgment was not challenged in the first appeal.

ARGUMENT

I. THE COURT OF APPEALS ERRONEOUSLY RULED THAT PLAINTIFF'S TERMINATION WAS "PROPER", WHEN IN FACT PLAINTIFF WAS TERMINATED WITHOUT DUE PROCESS.

A. INTRODUCTION

The trial court, after remand, and the Court of Appeals in Alexander II, both ruled that although plaintiff had been wrongfully denied bumping rights, and suffered economic and emotional distress damages flowing therefrom, "his termination from employment was not wrongful" and was "proper", and accordingly, certain economic and emotional distress damages flowing from his termination from employment were not recoverable.

However, plaintiff's termination from his

Menlo Park employment was not "proper", but rather was in violation of due process. Accordingly, the damages the Court of Appeals ruled were caused by the termination should have been awarded him in this action.

B. PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS WERE VIOLATED, RESULTING IN AN IMPROPER TERMINATION

A federal constitutional claim for improper termination in violation of due process depends on a plaintiff establishing that (1) he had a property interest pertaining to continuing employment, and (2) that he was deprived of that property interest without due process. Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

In Perry v. Sindermann, id., 92 S.Ct., at 2699, the Supreme Court stated that, "'[P]roperty' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather 'property'

denotes a broad range of interests that are secured by 'existing rules or understandings'. (Citation.) A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit..."

The personnel rules of the City of Menlo Park create a number of entitlements of benefits to a permanent employee working for the City of Menlo Park. These entitlements include a property interest in continuing employment and job security. (See Rule X, Section 2, and Rule 11.) These entitlements also included as part of that property interest in continuing employment and job security, a property interest in bumping rights, in re-employment preference rights, in retreat rights, and in certain procedural protections which in and of themselves provide legitimate claims of entitlement to benefits pertaining to a continuing property interest and job security.

The Court of Appeals failed to thoroughly review these personnel rules and make

determinations of entitlements (property interests) which Alexander had arising from them. As a result, the Court of Appeals erroneously concluded the termination was "proper", when in fact plaintiff was terminated improperly in violation of his due process rights.

In Cleveland Bd of Education v. Loudermill, supra, the Supreme Court held that if a public employee has a property interest in continued employment, he cannot be terminated from employment without first being given certain pre-termination due process procedures, or else the termination is improper.

In Loudermill, id., the Court focused on the employee's pretermination due process right to be given notice and an opportunity to respond to charges on which the termination action was being based.

In the instant case, plaintiff was denied the pretermination due process rights addressed in Loudermill, along with the additional pretermination due process rights of bumping rights, re-employment preference eligibility

list rights, and retreat rights. Furthermore, he was denied the protection of certain personnel rules of Menlo Park, the purpose of which was to enhance his job security and to put limitations on, and set up guidelines as to, the exercise of the City's discretion in deciding whether to impair his job security.

Accordingly his termination was improper and in violation of due process.

1. REASON NO. 1 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF RECEIVED NO NOTICE OF CHARGES OR OPPORTUNITY TO BE HEARD BEFORE BEING TERMINATED FROM EMPLOYMENT IN TOTO

Menlo Park terminated plaintiff from his employment in toto, despite his permanent status, and without giving him notice of the reasons for terminating him in toto or an opportunity to rebut the unknown reasons.

The trial court found that, "Rule V, Section 4, of Ex. 4 (personnel rules) provides that if a probationary employee is deemed unsatisfactory for the probationary position such employee shall 'return to prior classification and non-probationary status in that classification to the pay step he/she would

have had if not promoted.....Therefore, plaintiff had a right to be returned to classification 39.5, and if there was no available job for which plaintiff was qualified within that classification he should have been accorded the benefits of Rule X, as a permanent employee."

Rule X provides that an employee whose job has been abolished has certain retreat rights to the highest possible position, certain bumping rights, and certain re-employment preference eligibility rights. It also provides that if an employee is going to discharged from employment in toto, he must be given notice of the reasons for the proposed discharge. (Rule X, Sec. 2.)

Instead of giving plaintiff his Rule X rights, and instead of giving him notice and explaining the reasons for the proposed discharge from employment in toto, plaintiff was simply terminated from employment in toto without explanation and without an opportunity to address the unknown reasons for the action.

In Alexander I, the Ninth Circuit indicated that there was no administrative appeal

available to Alexander because the personnel rules "did not permit an appeal from a failure of probation, a layoff, or an informal discharge."

However, as noted in Loudermill, the process due is not prescribed by local personnel rules or state law, but by federal requirements. Since Alexander was a permanent employee (albeit in a promotional probationary position), and had a property interest in continuing employment, he could not be deprived of that property interest in continuing employment, i.e., terminated, without being afforded predeprivation due process requirements of notice and an opportunity to be heard. In this regard, the due process violation was clear--he was not even told the reasons he was being terminated from employment in toto, let alone given an opportunity to reply. Accordingly, under Loudermill, the termination was clearly improper and in violation of due process.

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2. REASON NO. 2 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF WAS DENIED BUMPING RIGHTS, CAUSING HIM TO BE TERMINATED IMPROPERLY FROM EMPLOYMENT IN TOTO

In our case, plaintiff had a legitimate claim of entitlement (property interest) to bumping rights under Menlo Park's rules, which the Court of Appeals affirmed in Alexander I.

The failure to give Alexander notice and an opportunity to be heard regarding denial of those bumping rights was a predeprivation denial of due process and rendered the termination from employment (not just the denial of bumping rights) improper.

In Alexander I, the Court held that "The injury suffered by plaintiff was unemployment", because of the denial of bumping rights. The Court indicated it viewed the property interest afforded by bumping as "substantial--Alexander's opportunity to continue his employment, maintain his income, and protect his reputation." Thus, the bumping rights were thought of as part of the property right to continuing employment. The clear implication is that a termination from that continuing employment without being

afforded bumping rights would be an improper termination, and that the bumping rights could not just be looked at as an insulated, separate right divorced from the right to continuing employment with the employer.

In this same light, in Gabe v. County of Clark, 701 F.2d 102 (9th Cir. 1983), it was held that plaintiff's "legitimate claim of entitlement to continued job security" included priority consideration for lateral transfer to another county job.

In McGraw v. City of Huntington Beach, 882 F.2d 384 (9th Cir. 1989), the Ninth Circuit ruled that a promotional probationary municipal employee had a property interest in continued employment which he/she could not be deprived of without being afforded certain bumping rights. The Court held that McGraw had been improperly terminated when she was denied these bumping rights. (See also, Sanchez v. County of Santa Ana, 915 F.2d 424 (9th Cir. 1990).)

Based on the aforesaid, the denial of bumping rights to Alexander was a predeprivation due process violation, which rendered the

termination improper. Plaintiff would never have been terminated if he had been given his bumping rights.

3. REASON NO. 3 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF WAS DEPRIVED OF HIS PROPERTY INTEREST IN RE-EMPLOYMENT PREFERENCE ELIGIBILITY RIGHTS

Under Rule X of Menlo Park's personnel rules, an employee with permanent status who was laid off (such as Alexander purportedly was after not passing his probationary period in the promotional position) had to be given re-employment preference rights for a period of two years, by being put on an eligibility preference list.

In Allen v. City of Beverly Hills, 911 F.2d 367 (9th Cir. 1990), the Court recognized both bumping rights and re-employment preference eligibility rights as rights which were legitimate claims of entitlement which an employee could not be deprived of without due process.

Alexander would have to be given notice and an opportunity to be heard before being deprived of his entitlement of being put on the re-

employment prefernece eligibility list. Accord, Stana v. School Dist. of City of Pittsburgh, 775 F.2d 122 (3rd Cir. 1985) [employee had a sufficient legitimate claim of entitlement to her place on the eligibility list so that she could not be deprived of it without due process).

Several cases in other circuits have taken a different view from Stana and Allen, and held that eligibility lists are not protected property interests afforded procedural due process protection. (See Hermes v. Hein, 742 F.2d 350 (7th Cir. 1984) [alleged unwritten rule on eligibility list was not in force throughout the department); Burns v. Sullivan, 619 F.2d 99, 104 (1st Cir.) cert. den. 449 U.S. 893, 101 S.Ct. 256 (1980) (no property interest in eligibility list for promotions).)

The case herein, however, is distinguishable. What is at stake is deprivation of part of an ongoing property right to continuing employment (maintenance of job security). In Hermes, supra, and Burns, supra, the employees were denied a promotion, but they

did not lose their employment in toto with the public entity. However, in our case, because of the denial of his re-employment rights (and bumping rights), Alexander suffered complete unemployment--his property interest in continuing employment (which property interest included absolute entitlements to bumping rights and re-employment rights as an alternative to termination). (See also, Gabe v. County of Clark, 701 F.2d 102 (1983), [county employer committed a "wrongful termination" against employee when it terminated her and deprived employee of her "legitimate claim of entitlement to continued job security as a County employee" without due process; the property interest of "continued job security as a County employee" included a right to priority consideration for lateral transfer to other positions, which right had been denied her.])

4. REASON NO. 4 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF WAS DENIED RETREAT RIGHTS, CAUSING HIM TO BE TERMINATED IMPROPERLY FROM EMPLOYMENT IN TOTO

Under Rule V, the trial court recognized that Alexander after not passing probation in

the promotional probationary position had an absolute entitlement to return to "prior classification and non-probationary status in that classification to the pay step he/she would have had if not promoted." (7-23-82 decision.)

Under Rule X, Section 3(E), "A retreating employee has a right to be retained in the highest salary range possible which is equal to or less than his or her present salary range."

Alexander was denied his retreat rights, was not returned to classification 39.5, and was not given any reason why he was not being returned to classification 39.5.

If there was no position available in classification 39.5, Alexander should have been given an opportunity for a hearing on the issue and a hearing on the issue of what type of retreat rights he would have thereafter. The retreat rights he would have had thereafter were defined under Rule X. They would have included bumping rights and re-employment eligibility preference rights (Rule X[3][D]),[F],[G],[H]). Furthermore, there was a requirement that Alexander, as a retreating employee, be retained

in the highest level position possible, under Rule X(3)(E).

If Alexander had been given his retreat rights under Rule V and Rule X, he would not have been terminated. The termination was accordingly improper, and in violation of his due process rights.

5. REASON NO. 5 THE TERMINATION WAS IMPROPER AND IN VIOLATION OF PLAINTIFF'S PROCEDURAL DUE PROCESS RIGHTS--PLAINTIFF HAD A PROPERTY INTEREST IN CERTAIN PROCEDURES, THE PROTECTION OF WHICH HE WAS DEPRIVED WITHOUT DUE PROCESS, AND WHICH DENIAL RESULTED IN AN IMPROPER TERMINATION

Local personnel rules do not define the process due once a property interest is established. Rather, what process is due is a federal due process requirement based on a balancing test involving the weight of the private property interest affected by the official action, the risk the procedures used will erroneously deprive that interest as well as the probable value of other procedures, and the fiscal or administrative burdens that other procedures would entail. (See Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Alexander I, supra, at 1374;

Cleveland Bd. of Educ. v. Loudermill, supra; Shango v. Jurich, 681 F.2d 1091 (7th Cir. 1982).)

However, personnel rules which set forth procedural requirements which provide significant restrictions on the decision-maker or articulable standards to guide his discretion establish a Fourteenth Amendment property interest in and of themselves, and an employee cannot be deprived of their protection without due process. (See Clemente v. United States, 766 F.2d 1358, 1364-65 (9th Cir. 1985); Dube v. State University of New York, 900 F.2d 587 (2nd Cir. 1990); Hogue v. Clinton, 791 F.2d 1318 (8th Cir. 1986); Parks v. Watson, 716 F.2d 646, 657-57 (9th Cir. 1983); Jacobson v. Hannifin, 627 F.2d 177 (9th Cir. 1980);).[1]

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[1]Some circuit courts appear to disagree and take the position that personnel rules setting forth procedural requirements can never rise to the level of a property interest. (See, Wells Fargo Armored Serv. v. Georgia Public Service Commission, 547 F.2d 938, 942 (5th Cir. 1977); Lake Michigan College Federation of Teacher v. Lake Michigan Community College, 518 F.2d 1091 (6th Cir. 1975); Siu v. Johnson, 748 F.2d 283 (4 Cir. 1984)[concept of property interest in procedures is "circular" and "conceptually unacceptable"). However, other circuit courts g further than Dube, supra, and Clemente, supra, c

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Defendant Menlo Park violated a number of personnel rules which were clearly designed to provide significant restrictions on the decision-maker and/or articulable standards to guide its discretion in deciding to terminate employees. The rules on bumping, re-employment priority, and retreat rights, have already been discussed. In addition, the following rules would appear to have risen to an entitlement level in connection with providing job security protection to plaintiff--1) Rule VIII, Section 3, requiring performance evlauations (there were none done--performance evaluations are meant to provide an articulable guideline to a decision-maker as to an employee's performance and to restrict his unfettered discretion to state an

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the other side, and appear to take the position that procedural personnel rules as a matter of law define the due process due (at least to the extent they don't provide less process due than federal requirements), especially if the procedures pertain to protecting job security. (See, e.g., Skeehan v. Board of Trustees, 590 F.2d 470, 485 (3rd Cir. 1978); Mabey v. Reagan, 537 F.2d 1036 (9th Cir. 1976); see also, Burnaman v. Bay City ISD, 445 F.Supp. 927 (S.D. Texas 1978).) This case offers an opportunity for the Supreme Court to clarify this conflict among the circuit courts as to when, if ever, the protections provided by certain personnel rules rise to the level of being a property interest--a legal claim of entitlement.

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employee is not doing well [when the evaluation shows the opposite].) 2) Rule V, Section 2--providing for extension of the probationary period for good cause (good cause is defined). 3) Rule VII--requirement that adequate training be given to a probationary employee.

Plaintiff had a property interest in all these rules, because they limited the discretion of the decision-maker and provided articulable standards to guide a decision-maker's discretion. Defendant Menlo Park's failure to afford plaintiff the protection of these rules (rules aimed at enhancing plaintiff's property interest in continuing employment and job security) rendered the termination improper and in violation of due process.

C. THE TERMINATION WAS IMPROPER BECAUSE IT WAS ARBITRARY AND CAPRICIOUS AND WITHOUT JUST CAUSE SO AS TO BE A SUBSTANTIVE DUE PROCESS VIOLATION.

If a decision to terminate an employee is made arbitrarily and capriciously, and/or without good cause, there is a violation of due process.

In Alexander I, the Court stated, "Where a public employee is terminated without just

cause, the question of proximate cause does not arise because the violation is so closely connected to the harm suffered." In Siu v. Johnson, 748 F.2d 238 (4th Cir. 1984), the Court indicated that evidence of personal malice, or reckless inattention to relevant materials, or comparable wholly non-profesional factors is supportive of a conclusion of an arbitrary and capricious decision in violation of due process.

In the instant case, the wholesale disregard of the personnel rules (at least ten different personnel rules were broken in the decision to terminate plaintiff, including a denial of bumping and re-employment preference rights and retreat rights plaintiff clearly had) shows a reckless inattention to relevant materials at best and personal malice at worst. Plaintiff's supervisor acknowledged he had bumping rights, but urged her boss the rights be disregarded, and plaintiff not be "saved". Mike Bedwell, the City Manager who made the decision, testified he did not offer plaintiff his bumping rights even though he knew he had them because he did not want to demean or anger him,

indicating personal malice and/or wholly non-professional factors influencing the decision to terminate. Bedwell indicated no concern about plaintiff being thrown into unemployment, or about adverse publicity and stigmatization to plaintiff which was sure to follow in the small close-knit Menlo Park/East Palo Alto community, indicating his main concern was to get rid of plaintiff in spite of the various rules mandating his retention in one capacity or another.

This arbitrary and capricious decision-making and wholesale disregard of the rules is violative of substantive due process, independent and apart from a consideration of the Loudermill pre-deprivation due process analysis set forth in Section I(B) above. It is yet an additional reason why plaintiff's termination was improper and in violation of due process.

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II. THE COURT OF APPEALS USED THE WRONG LEGAL STANDARD IN DECIDING TO CUT OFF PLAINTIFF'S ECONOMIC LOSS AFTER HIS VOLUNTARY RESIGNATION FROM HIS SUBSEQUENT JOB.

A. RESIGNATION OR TERMINATION FROM A SUBSEQUENT JOB SHOULD BE ANALYZED IN TERMS OF MITIGATION PRINCIPLES OF REASONABLENESS OF CONDUCT RATHER THAN IN PROXIMATE CAUSE TERMS OF AN INTERVENING CAUSE CUTTING OFF ALL ECONOMIC LOSS THEREAFTER.

The Ninth Circuit affirmed the trial court's decision to cut off Alexander's employment loss as of the date he went to work in the Ravenswood/East Palo Alto Director position, and to not allow him to receive economic loss for subsequent economic losses he incurred after he voluntarily resigned from that position.

The Court of Appeals held that "the district court correctly determined that termination of subsequent employment was causally unrelated to the failure to offer Alexander bumping rights, but rather was a result of proper termination, judicial decisions and publicity about the litigation."

Implicit in the Court of Appeals' opinion (and the district court's) was that Alexander voluntarily left for legitimate health reasons

(extreme stress he was suffering from the particular job of East Palo Alto Director), but that that distress was not in its opinion directly caused by the denial of bumping rights, but rather was caused by termination from employment with Menlo Park (which flowed from the bumping rights), and judicial decisions and publicity about the litigation brought to redress the denial of bumping rights and termination flowing therefrom.

In addition to wrongfully characterizing Alexander's termination from Menlo Park employment as "proper" (see analysis in section I, above), the opinion wrongfully analyzes the issue of the effect of resignation from a subsequent job on the cut-off of economic damages in a constitutional or civil rights case as exclusively a proximate cause issue instead of a mitigation issue.

In Ford Motor Co. v. EEOC, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982), the U.S. Supreme Court held that employers who committed employment discrimination could cut off further economic loss by offering the adversely affected

employee an unconditional job offer of the same job which they had been wrongfully denied.

On the other side of the equation, there is utter confusion between and in the different Circuit Courts as to what actions by the employee (rather than actions by the employer [which the Ford Motor Co. v. EEOC decision addressed]) cut off back pay liability of the employer.

At the outset, it is clear that an employee needs to make a diligent and reasonable search for substantially similar employment after being terminated in violation of his civil rights. (See Ford Motor Co. v. EEOC, Id., at 3066-3067.)

However, once having obtained subsequent employment, it is totally confusing as to what effect on back pay loss an employee's resigning from or being involuntarily terminated from the subsequently obtained job has on his ongoing back pay loss occurring after having been unlawfully deprived of the initial job.

In the Eleventh Circuit, there is no cut-off of back pay loss if the employee resigns a subsequent job because of dissatisfaction.

(E.E.O.C. v. Guardian Pools, 828 F.2d 1507 (11th Cir. 1987).) Using this "dissatisfaction" test, Alexander's back pay loss clearly would not have been cut off by his resigning the East Palo Alto job.

In Sangster v. United Air Lines, Inc., 633 F.2d 864 (9th Cir. 1980), the Ninth Circuit held that a voluntary leaving of subsequently obtained employment in a civil rights case does not operate to limit economic damages proximately caused by a wrongful termination if the voluntary leaving was for a "good reason". The good reason did not have to be related to the civil rights or due process violation by the previous employer--it simply had to be a good reason. In Sangster, the Court cited with approval, NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2nd Cir. 1965, cert. den., 384 U.S. 972, 86 S.Ct. 1862, 16 L.Ed.2d 682 (1966). In NLRB v. Mastro Plastics Corp., id., at 179, the Court held that an example of a good reason for an employee to terminate subsequently obtained employment, which would not be considered a failure to mitigate damages, would

be for reasons related to the subsequently obtained employment's effect on the employee's health. (See also, Wells v. North Carolina Bd. of Alcoholic Control, 740 F.2d 340, 342 (1983).)

Under such a "good cause" test, Alexander's resignation from the East Palo Alto Director job would not be considered a failure to mitigate damages, since it was for good cause (extreme emotional distress, a health-related reason).

In Boehm v. American Broadcasting Co., Inc., 929 F.2d 482 (9th Cir. 1991), the Ninth Circuit indicated in adopting a jury instruction that the test is whether the employee made "reasonable efforts to find or retain employment." (Emphasis added). This test is closely akin to the Sangster-NLRB v. Mastro test of whether there was "good cause" to resign from the subsequent job.

The Tenth Circuit, in Whatley v. Skaggs Companies, Inc., 787 F.2d 1129 (10th Cir. 1983) has analyzed the issue in terms which serve as a bridge between the "proximate cause" test enunciated by the Ninth Circuit in our case and the "good cause" or "reasonability" test

enunciated in Sangster, NLRB v. Mastro, and Boehm. In Whatley, the Court held that an employee's leaving subsequently obtained employment for health reasons, and thereafter going on disability, did not serve to cut off economic loss flowing from the original wrongful adverse job decision. The Court noted that plaintiff, after not obtaining a management position with the defendant, had accepted a job requiring strenuous physical labor and had suffered a back injury. The Court noted that if plaintiff had received the wrongfully denied management position, he never would have taken the subsequent job and would not have suffered the back injury (which was related to the physical nature of the subsequent job and plaintiff's response to said subsequent job's conditions).

Thus, this case presents the Supreme Court with the opportunity to bring clarity to an issue handled inconsistently and with great confusion by the different Circuit Courts (and even within each Circuit Court, such as the Ninth Circuit--compare Sangster with Boehm with

Alexander II.)

Significantly, in Ford Motor Co. v. EEOC, supra, two employees were laid off at a subsequent employer after being discriminated against by the first employer (Ford). However, their back pay loss caused by the discriminatory acts of the first employer was not cut off as of the time they were laid off. There was good reason why they did not retain the subsequent employment (layoff), just as there was good reason plaintiff did not retain his subsequent employment (resignation based on health reasons-reasons--severe emotional distress.).

B. THE COURT OF APPEALS' PROXIMATE CAUSE ANALYSIS IGNORES THE FACT THAT IN PROCEDURAL DUE PROCESS CASES, ALL INTERVENING CAUSES OF DAMAGE ARE NOT IN FACT SUPERSEDING CAUSES, BUT MAY BE SIMPLY EVENTS FLOWING FROM, AND PROXIMATELY CAUSED BY THE DUE PROCESS VIOLATION.

The Ninth Circuit opinion in this case takes the position that the damages caused by the procedural due process violation it found (denial of bumping rights) were somehow cut off by a superseding intervening cause (termination). However, the termination was not a superseding intervening cause. Rather, the violation of due process caused the termination.

(See Alexander v. City of Menlo Park, 787 F.2d 1371, 1375 (9th Cir. 1986)--"The injury suffered by plaintiff was unemployment".) Plaintiff would not have been terminated from employment if he had not been denied due process and been given his bumping rights. (Accord, Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981); Gabe v. County of Clark, supra.)

In Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), the Supreme Court indicated that "the rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question..." The Court drew a distinction between damages caused by a procedural due process violation and damages caused by deprivation of a property interest the procedural due process violation concerned. The Court indicated that only if the underlying deprivation came about because of the procedural due process violation, could damages arising out of the underlying deprivation be recovered.

The application of Carey v. Piphus appears

to be creating confusion among the Circuit courts, since the analysis of procedural due process violation causing an underlying deprivation appears to have been rejected out of hand in Alexander II, supra. The Court of Appeals' analysis stopped with the distinction being made between the procedural due process violation (bumping rights being denied by Menlo Park) and underlying deprivation (plaintiff being terminated after his bumping rights were denied) without the connection being made between the two as should have been done.

This Court should address the whole issue of procedural due process violations, and when underlying economic loss arising from job loss occurring after a procedural due process violation is compensable. (See, Chalmers v. City of Los Angeles, 762 F.2d 753 (9th Cir. 1985), economic harm caused by being prevented from selling T-shirts was in turn caused by denial of procedural due process violation and was accordingly compensable; Merritt v. Mackey, 932 F.2d 1317 (9th Cir. 1991) (economic losses from being terminated from employment are

compensable if person would not have been terminated if procedural due process had not been denied him). Accord, Brewer v. Chauvin, 938 F.2d 860, 865 (8th Cir. 1991).)

III. THE COURT OF APPEALS USED THE WRONG LEGAL STANDARD IN DECIDING THAT EMOTIONAL DISTRESS CAUSED BY PLAINTIFF'S TERMINATION BY PUBLICITY, AND BY JUDICIAL PROCEEDINGS BROUGHT TO REDRESS THE WRONG WAS NOT COMPENSABLE.

The trial court originally awarded plaintiff $100,000 emotional distress damages, holding that the emotional distress plaintiff sustained was "at least in substantial part proximately resulting from the denial of procedural due process".

Later, the trial court reduced the $100,000 award to $10,000, holding that 10% of plaintiff's emotional distress was from loss of bumping rights, 60% was from "termination of employment", and 30% was from "reaction to publicity and judicial decisions". The trial court indicated that the 60% of emotional distress from "termination of employment" and the 30% from "reaction to publicity and judicial decisions" was not

proximately caused by the due process violation (loss of bumping rights).

In addition to the due process violation being broader than mere loss of bumping rights (see analysis in Section I, above), even if the only due process violation was loss of bumping rights, the "termination of employment" and the "reaction to publicity and judicial decisions" would never have come about if plaintiff had been afforded his bumping rights. He would have continued to be employed at Menlo Park, and would not have been terminated. There would never have been the publicity and the judicial decisions following his termination, because the termination would not have happened.

Once again, it is clear that this Court needs to clarify its ruling of Carey v. Piphus on proximate cause in 42 U.S.C. Section 1983 cases, especially as applied to the employment context. Although emotional distress damages flowing from a substantive harm occurring after a procedural due process violation are not compensable in a 42 U.S.C. 1983 case if the substantive harm would have occurred even if due

process had been afforded, they are compensable if the substantive harm would never have come bout except for the procedural due process violation. Furthermore, Carey v. Piphus, id., clearly put the burden of proving that the damages from the substantive harm following the procedural due process violation are not compensable on the defendant, not the plaintiff.

The trial court in our case relied on Wilson v. Taylor, 658 F.2d 1021 (5th Cir. Unit B 1981, appeal after remand, 733 F.2d 1539 (11th Cir. 1984). The Court's reliance on Wilson was misplaced. In Wilson, a plaintiff was denied a hearing at first (procedural due process violation), but ultimately received one and was terminated anyway despite the hearing (procedural due process violation was cured; termination did not come about because of the procedural due process violation). Accordingly, the Court reasoned, the emotional distress arising from the termination was distinctly different and had nothing to do with the emotional distress arising from the violation of procedural due process (lack of a hearing).

However, in our case, the violation of due process caused the termination. (See Alexander v. City of Menlo Park, 787 F.2d 1371, 1375 (9th Cir. 1986)--"The injury suffered by plaintiff was unemployment".) Plaintiff would not have been terminated from employment if he had not been denied due process and been given his bumping rights. Accord, Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981) [damage to reputation and emotional distress arising as a result of termination which was unlawful because of procedural due process violation, and which termination would not have occurred if procedural due process violation did not occur, was compensable in a 42 U.S.C. Section 1983 action]; Barberic v. City of Hawthorne, 669 F.Supp.985 (C.D. Cal. 1987)[police chief who was involuntarily retired without procedural due process, and who would have been retained in employment and not been involuntarily retired if he had been afforded procedural due process, was entitled to emotional distress damages caused not only by the procedural due process violation itself but also emotional distress damages

caused by his termination (deprivation of his property interest) which would have never occurred if he had been afforded procedural due process]; Derstein v. Benson, 714 F.Supp. 481 (D.Kan. 1989) [state court services officer who would not have been discharged if he had been afforded procedural due process prior to discharge was entitled to damages for emotional distress suffered as the result of the unjustified termination].)

Similarly, the 30% of emotional distress plaintiff suffered which the trial court attributed to reaction to the judicial proceedings and publicity surrounding the termination, flowed directly from the due process violation plaintiff suffered, and should be compensable based on the proximate cause principles set forth in Carey v. Piphus, supra.

In Alexander I, the Court stated that plaintiff's property interest was "substantial--Alexander's oppportunity to continu his employment, maintain his income, and protect his reputation." For the Court to then find in Alexander II that publicity which injures

reputation is somehow not compensable seems irreconcilable with the previous opinion, especially in light of Carey v. Piphus stating that the remedy should be tailored to the interests protected by the particular right in question.

There were at least three different articles published on plaintiff's termination in the Peninsula Times Tribune, a local newspaper with wide circulation in plaintiff's community. The first article, published in 1980, quoted the City Attorney of Menlo Park stating that, "The city discharged Alexander because he did not meet the city's job performance standards." The City Attorney also was quoted as stating, "By then, we were acutely aware of the complaint he had filed with the EEOC, so we acted in the most prudent fashion possible before we fired him." This was especially distressing to plaintiff, since there had been wholesale rule violations in his termination, and he had been intentionally denied bumping, re-employment preference list, and retreat rights. Also, he had never been told that his performance in

employment in toto with the City was anything other than excellent. The second article, published in April 1983 was about the hiring of plaintiff by Ravenswood Recreation District. The article mentioned that, "Alexander currently has a lawsuit pending against City of Menlo Park resulting from his firing there in 1979 after five years of employment." Alexander was starting out on a new subsequently obtained municipal job at the time, and this adverse publicity created substantial additional distress and affected his ability to do the job adequately. The third article, published in May 1983, referred to the ongoing litigation in this case, and the headline read in part, "East Palo Alto official wants Menlo Park pay". These articles and the continuing publicity of his termination from employment, greatly stigmatized and humiliated plaintiff, and adversely affected his reputation in the community.

In Busche v. Burkee, 649 F.2d 509 (7th Cir. 1981), the Court held that a plaintiff whose due process rights had been violated by a wrongful termination, and who had suffered general

damages from publicity surrounding the termination, was entitled to an award of general damages caused by the publicity. The due process violation caused the publicity which caused the general damages to the plaintiff. (Cf. Brady v. Gebbie, 859 F.2d 1543, 1558 (9th Cir. 1989), in which the Ninth Circuit seemed to indicate that statements published by third parties cannot form the basis of liability or damages.)

The Court should clarify whether emotional distress caused by publicity in newspapers arising out of a wrongful act is compensable under 42 U.S.C. Section 1983, or whether the newspaper articles published by a third party are considered a superseding, intervening cause of the distress arising from the publicity (as the Court of Appeals in Alexander II appears to have decided).

Significantly, in our case, top officials of the City of Menlo Park were quoted on the termination of plaintiff. Furthermore, the termination of plaintiff--not some alleged conduct he engaged in prior to his termination--

was the subject of the publicity.

Similarly, the judicial proceedings would never have come about if the due process violation had occurred, and accordingly under the principles of Carey v. Piphus, supra, emotional distress suffered pertaining thereto should also be compensable. (See also, Restatement (Second) of Torts, Section 446.)

In the case herein, the Ninth Circuit took an unduly restrictive view of proximate cause in 42 U.S.C. Section 1983 cases, and an unduly expansive view of when an event caused by the due process violation serves as an intervening, superseding cause of emotional distress damages. This case presents the Supreme Court with an opportunity to clarify the proximate cause principles in 42 U.S.C. Section 1983 cases addressed in Carey v. Piphus, supra.

IV. THE TRIAL COURT ERRED IN DENYING PLAINTIFF REINSTATEMENT RIGHTS BASED ON HIS HAVING RESIGNED FROM SUBSEQUENT EMPLOYMENT AT EAST PALO ALTO.

The trial court denied plaintiff reinstatement and/or front pay and/or vocational rehabilitation based on its legal determination that an employee is not entitled to this type of

equitable relief if he resigns from a subsequently obtained job. Such resignation, according to the trial court, cuts off not only the right to further economic compensation after the resignation, but also any right to reinstatement or front pay or vocational rehabilitation.

This legal reasoning as applied to a reinstatement remedy is perhaps even more drastic than the legal reasoning which denied any economic compensation after the resignation. Under this proposed rule, an employee who took a subsequent job and was forced to leave it a week later because of some temporary health problem, would cut off any equitable remedies such as reinstatement, front pay, or vocational rehabilitation.

When a plaintiff has been deprived of a property right without due process, which he would not have been deprived of if he had received due process, he is entitled to reinstatement in order to make him whole. Plaintiff was entitled to reinstatement to the employment he was deprived of because of the

denial of his due process rights. (See, e.g., Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973); Abbott v. Thetford, 529 F.2d 695 (5th Cir. 1976) ["...(T)he Courts have established the principle that reinstatement is a necessary element of an appropriate remedy in wrongful employee discharge cases (citations)."]

The trial court's reasoning turns the make whole remedy on its head. If an employee can be denied desperately needed equitable relief because he voluntarily resigned an interim job for good reason, the make whole remedy simply is no longer viable.

The importance of not allowing the chipping away of the reinstatement remedy in this fashion cannot be overemphasized. Reinstatement is a unique type of relief. An award of back pay and benefits cannot make up for career loss, loss of seniority, present job security, stigmatization from loss of job, and gaps in a career on an employment resume, where as reinstatement and/or ordering the process due can address such difficult-to-calculate losses.

In Hansard v. Pepsi-Cola Metropolitan

Bottling Co., 865 F.2d 1461 (5th Cir. 1989), the Court cut off back pay loss for failure to mitigate in March 1984 and thereafter; however, the Court remanded the case because the trial court in July 1986 failed to consider the issue of reinstatement. (See also Thorne v. City of El Segundo, 802 F.2d 1131 (9th Cir. 1986), in which the Court found plaintiff entitled to reinstatement/front pay rights even though she had quit subsequent employment.)

The Ninth Circuit in its 1991 decision dodged the issue of reinstatement the trial court had ruled upon. The Ninth Circuit stated Alexander "abandoned" his reinstatement claim because he hadn't raised it on his first appeal. It ignored the fact the trial court, after remand from the first appeal, found the issue no longer moot because Alexander was no longer working, took considerable evidence on the issue, and made an actual finding on the issue. (See Milgard Tempering, Inc. v. Selas Corp. of America, 902 F.2d 703 (9th Cir. 1990); Quern v. Jordan, 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 1148 n. 18, 39 L.Ed.2d 358 (1979) ["'While a

mandate is controlling as to matters within its compass, on the remand, a lower court is free as to other issues.' (Citations.)."")

Alexander II also ignored the whole nature of equitable relief--that what type of equitable relief should be awarded and when it is appropriate changes throughout a case as a person's circumstances change. Equitable relief is adopted to the situation to alleviate the situation contemporaneously. Plaintiff, after remand, had experienced a number of years of unemployment and underemployment, and equitable relief of reinstatement was suddenly very important to make him whole (which it had not been when he was working immediately prior to the appeal). Reinstatement can be brought up and decided at any point in time by a trial court in a civil rights proceeding--before an appeal, after an appeal, or even aftr a judgment is entered after appeal. (See, e.g., Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263-264 (5th Cikr. 1974); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 429 (8th Cir. 1970); Brown v. Gaston County Dyeing Machine

Co., 457 F.2d 1377, 1383 (4th Cir. 1972).

The Court should clarify the whole issue of reinstatement and when it should be awarded in due process cases. Reinstatement (or its alternative remedies of front pay or vocational training) is an extremely important part of making a 42 U.S.C. Section 1983 plaintiff whole. This remedy should not be undermined by an overly strict law of the case ruling (especially when the trial court after remand took new evidence on the issue, made a finding on it, and felt it to be a germane issue). Nor should such an important make-whole remedy be disallowed because of a decision by a plaintiff to resign a subsequent job (however short the job was and however good the reason was to resign).

V. THE COURT ERRED IN AFFIRMING THE AWARD OF PREJUDGMENT INTEREST

Prejudgment interest in a civil rights case is a highly important element of relief because of the length of time these proceedings often take to litigate. (See Ford Motor Co. v. EEOC, supra, at 3060, 3064--extremely adverse effects of delays in litigation on civil rights victims

and their families in employment cases, and importance in fashioning remedy taking into account the delays.) The different circuits have adopted very different standards on what methodology to use in determining the amount of prejudgment interest. Because of the huge delays in litigation on these types of cases, the difference in computation methodology can cause differences in result running into the tens of thousands of dollars.

In the instant case, the Court did not use the T-bill rate set forth in 28 U.S.C. Section 1961 (the methodology used for post-judgment interest computation), which would have locked in the T-bill rate in effect at the time of the loss up to the date of judgment. Rather, the Court used a rate varying yearly as interest rates continued to vary. The problem with not locking in the rate was plaintiff had taken out a loan at the time of his loss locking in the high rate on the debit side. However, on the credit side, he received in the judgment the much lower rates which came into effect as the years passed and the rates moved downward.

Other circuits have used a methodology leading to an even higher rate than the 28 U.S.C. Section 1961 post-judgment interest computational methodology. They have looked at prejudgment interest in terms of the cost of borrowing money at the prime rate, which would be significantly higher than the 28 U.S.C. Section 1961 T-bill rate (which is an investor's rate, not a borrower's rate). (See Alberti v. Klevenhagen, 896 F.2d 927 (5th Cir. 1990). Since plaintiff in fact borrowed approximately the amount of his economic loss, such a borrower's rate would seem to be even more appropriate in the instant case.

VI. THE COURT ERRED IN NOT AWARDING PUNITIVE DAMAGES.

The Court never got to the punitive damages issue, holding that Mike Bedwell was never found liable by the trial court, and the issue was not appealed in the first appeal.

However, plaintiff appealed all grounds against both defendants (the City of Menlo Park and Bedwell) in his opening brief in the first appeal. Furthermore, the Ninth Circuit in its decision in Alexander I, supra, at 1375 clearly

held that, "Alexander proved the defendants violated his due process rights by failing to inform him he could bump into either of two positions." (Emphasis added).

Punitive damages for deprivation of civil rights against an individual City official should be awarded when the defendant wilfully and intentionally violates another's civil rights or when the defendant acts with reckless or callous indifference to the federally protected rights of others. Smith v. Wade, 461 U.S. 30, 1903 S.Ct. 1625, 75 L.Ed.2d 6232 (1983).

Defendant Bedwell testified that he knew plaintiff had bumping rights, but he did not want to "demean" or "insult" plaintiff by explaining to him his bumping rights (to a lower position). It is difficult to understand this rationale, since the alternative he chose was to cause plaintiff to be thrown totally out of work, into unemployment and financial deprivation, without explanation.

Bedwell's self-stated rationale falls apart eveen further when one examines a series of

intentional acts showing reckless and callous indifference to plaintiff. For example, Bedwell testified plaintiff's only bumping rights were to Gym Director or Night Clerk, two of the lowest paid positions in the City, whereas the personnel rules (Rule X, Section 3(E)) clearly spelled out that plaintiff, if he was being laid off, had a right to be retained in the highest possible salary. Furthermore, Bedwell did not put plaintiff on the re-employment preference eligibility list, as he was entitled to be, in which plaintiff would have become eligible for a number of highly paid jobs over the ensuing two years. Other acts showing a reckless and callous indifference to plaintiff have been set forth, above, in the Factual Background section.

VII. CONCLUSION

The petition for writ of certiorari should be granted for all of the above-stated reasons.

LOUIS A. HIGHMAN

By_____
Attorney for
Petitioner
Robert
Alexander

91-1900

(2)

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

October Term 1992

No. _____

ROBERT ALEXANDER,

Petitioner,

-v-

CITY OF MENLO PARK,
MIKE BEDWELL,
Manager of City
of Menlo Park,

Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Submitted By

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT ALEXANDER,

Plaintiff-Appellant,

v.

CITY OF MENLO PARK;
MIKE BEDWELL, City Manager
of City of Menlo Park,

Defendants-Appellees.

_____/

No. 90-16422

D.C. NO. CV-80-04369-WAI

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, District Judge, Presiding

Argued and Submitted October 10, 1991
San Francisco, California
Filed December 13, 1991

Before: CHAMBERS, TANG, AND TROTT, Circuit Judges.

Robert Alexander appeals the district court's award of economic and consequential damages resulting from a due process violation arising from his termination from employment with the City of Menlo Park without the

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

opportunity to "bump" to a different job. Alexander challenges the: (1) economic loss amount; (2) emotional distress award calculation; (3) deletion of the district court's finding that he had not received severance pay, was not placed on the re-employment eligibility list, and was not offered positions after termination; (4) failure to award reinstatement; (5) calculation of pre-judgment interest; (6) failure to award vocational rehabilitation in lieu of reinstatement; (7) failure to order expungement of employment records; and (8) failure to award punitive damages against Mike Bedwell, as city manager.

The district court's computation of damages is a finding of fact. Ticor Title Ins. Co. v. Florida, 937 F.2d 447, 451 (9th Cir. 1991). We must therefore defer to the district court unless the findings are clearly erroneous. Hoptowit v. Ray, 682 F.2d 1237, 1245, (9th Cir. 1982). We review de novo the legal standard used by the district court in computing damages. Palmer Construction v. Cal State Electric, No.

90-55575, slip op. 9875, 9862 (9th Cir. July 31, 1991). We conclude that the district court did not err in its damage award.

I

The district court correctly determined that Alexander suffered economic loss only during the period between his termination without bumping rights and his employment with the City of East Palo Alto. The district court considered the positions for which Alexander was qualified, keeping in mind his receipt of a teaching certificate and Masters of Arts degree, and concluded that the position with East Palo Alto was at a level equal to or higher than his previous position. This finding is not clearly erroneous.

The damages in a Section 1983 action must be for actual loss causally connected to the due process violation. The district court held that Alexander terminated employment with East Palo Alto for reasons unrelated to the due process violation. The district court correctly determined that termination of subsequent employment was causally unrelated to the failure

to offer Alexander bumping rights, but rather was a result of proper termination, judicial decisions and publicity about the litigation.

II

The district court found that Alexander had suffered damages for emotional distress compensable in the sum of $100,000. It then apportioned the award to ten percent, commensurate to the causal effect of the due process violation. It reasoned that factors other than the failure to be accorded bumping rights caused the emotional distress. This holding is not in error.

III

Alexander abandoned his claim to the re-employment eligibility list when it was not raised as an issue in his first appeal from the district court. Therefore, it cannot now be argued on appeal. See United States v. Loya, 807 F.2d 1483, 1487 (9th Cir. 1987); Munoz v. County of Imperial, 667 F.2d 811, 817 (9th Cir. 1982), cert. denied, 459 U.S. 825 (1982). Alexander's mere reference to the re-employment eligibility list in the prior appeal is

insufficient to preserve the issue for a later appeal. See Taylor v. United States, 815 F.2d 249, 252 (3d Cir. 1987) (issue was preserved for a subsequent appeal when it was actually argued in a footnote). The opinion on appeal did not leave this issue open for further action. The remand was limited to determining emotional distress and attorney's fees. Alexander v. City of Menlo Park, 787 F.2d 1371, 1376 (9th Cir. 1986), cert. denied, 479 U.S. 1032 (1987).

IV

Pre-judgment interest is within the discretion of the trial court and is reviewed for an abuse of discretion. Western Pacific Fisheries, Inc. v. SS President Grant, 730 F.2d 1280, 1288 (9th Cir. 1984). The district court determined that an interest rate other than that prescribed by 28 U.S.C. § 1963 (1988) was required by the equities in the case. The facts are sufficient to conclude that the district court did not err in examining the countervailing equities.

V

Alexander did not seek reinstatement or

vocational rehabilitation in the first appeal, therefor the issues were abandoned. Loya, 807 F.2d at 715.

Expungement is an equitable remedy. The trial court's decision not to award expungement was not an abuse of discretion based on the facts presented.

Judgment was initially rendered only against the City of Menlo Park. This aspect of the judgment was not challenged in the first appeal. Any claims against Mike Bedwell individual were abandoned.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT ALEXANDER,

Plaintiff-Appellant,

v.

CITY OF MENLO PARK;
MIKE BEDWELL, City Manager of City of Menlo Park,

Defendants-Appellees.

_____/

No. 90-16422

D.C. NO. CV-80-04369-WAI

O R D E R

FILED
FEB. 25, 1992

Before: CHAMBERS, TANG, and TROTT, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK, and MIKE BEDWELL, City Manager of City of Menlo Park

Defendants.

/

No. C-80-4369-WAI

D E C I S I O N

FILED JULY 23, 1982

Plaintiff is entitled to judgment against the City of Menlo Park only in the sum of $11,114.03, together with interest at the rate of 7% per annum from and after the date of entry of judgment herein, together with reasonable attorney's fees and costs of suit actually incurred.

Plaintiff asserts claims under Title VII (42 U.S.C. § 2000e), and under 42 U.S.C. § 1983.

Plaintiff has failed to establish by a preponderance of the evidence a right to recover under Title VII. Assuming that a prima facie case was made out under the necessary criteria, as set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), any inference of

discrimination was dispelled and wholly rebutted by the heavy weight of the evidence, which shows defendant to have conducted personnel practices in a fashion wholly free of racial bias or discriminatory intent, as is conclusively illustrated by the employment history of Aaron Johnson, during his period of employment with defendant.

The evidence further emphasizes defendant's absence of bias or discriminatory intent by its showing with respect to defendant's treatment of plaintiff when his job of Youth Director was abolished by City Council action. A new and more highly paid position was created for plaintiff and offered to him. That degree of solicitude for plaintiff's welfare is not consistent with bias.

Furthermore, there is no evidence of retaliation. I find that plaintiff's failure of probation was justified by the evidence. Leydon testified that on at least a weekly basis she orally requested lesson plans from plaintiff and never received any that were satisfactory. Plaintiff did not request any guidance with

respect to lesson plans until June 7, 1979. Leydon testified that in the case of a supervisory employee, such as plaintiff, such guidance should not be necessary and was not requested until June 7. When plaintiff did request guidance, Leydon gave him a packet of sample lesson plans.

Leydon started mentioning lesson plan completion to plaintiff as early as April 30, 1978. Ex. N.

The significance of lesson plans is illustrated by Leydon's statements as contained in page 3 of Ex. 35, and by the job performance standards, Ex. 13, which were agreed to by Leydon and plaintiff, and which require the preparation of daily work sheets/lesson plans outlining at least five activities for each day of the summer program. According to Ex. B, the lesson plans were to be prepared by May 1.

I conclude that plaintiff's failure of probation was not the result of retaliatory discrimination, but of plaintiff's failure, after repeated notice, to perform a significant part of his job.

Plaintiff is, however, entitled to relief under the provisions of 42 U.S.C. § 1983. Specifically, plaintiff was denied procedural due process of law as guaranteed him under the United States Constitution because the defendant failed to accord him all that was due him in these circumstances by the Personnel Rules duly adopted by defendant as Resolution No. 3064, on June 14, 1978, Ex. 4.

Rule V, Section 4 of Ex. 4, provides that if a probationary employee is deemed unsatisfactory for the probationary position such employee shall "return to prior classification and non-probationary status in that classification to the pay step he/she would have had if not promoted." The abolition of plaintiff's prior position in classification 39.5 is not contested.

I find that under the Personnel Rules, Ex. 4, the term "classification" does not mean "position." To hold that Rule V, Section 4 means that a failed promotional probationary employee is entitled to a return only to the position formerly held, as distinguished form

the classification formerly held, is inconsistent with the plain meaning of the words used in Rule 1 of Ex. 4.

Therefore, plaintiff had a right to be returned to classification 39.5, and if there was no available job for which plaintiff was qualified within that classification he should have been accorded the benefits or Rule X, as a permanent employee.

Plaintiff was entitled to bumping rights; X Subd. 3D.

Rule X Subd. 3d provides that bumping rights can be exercised if the employee displacing another employee is in the opinion of the department head qualified to perform the job in which the displacement occurs.

I am satisfied from the testimony of Leydon and Bedwell that neither would have approved plaintiff's displacement of Aaron Johnson or of any employee outside of the Community Resources department. Bedwell testified that plaintiff was qualified to displace occupants of such jobs as gym director an night clerk. While the acceptance of such a position seems inconsistent

with plaintiff's employment orientation as revealed from the record as a whole, plaintiff had a right to exercise his X Subd. 3D rights with respect to those positions. On May 5, 1982, plaintiff testified that he "might have been interested" in the gym director and night clerk jobs. Whether plaintiff would have taken the jobs or not, the right to bump into them should have been available to plaintiff, even though it was felt that the proffer of such work would insult and demean plaintiff.

The contentions of defendant in this case on the issue now under discussion is that plaintiff received notice of layoff in a timely fashion on January 24, 1979, and subsequently elected employment with the city in the new capacity of Recreation Supervisor II, as a probationary employee. The city contends that plaintiff failed probation and cannot now claim layoff rights by virtue of termination of that employment, because he was already in layoff status from his permanent employment, that of a class 39.5 employee, and in consequence had no permanent classification to which to return.

There is no question but what the layoff provisions of the Personnel Rules are invoked by the letter marked Ex. 14. All of the incidents of layoff are set forth in paragraph 4 as an alternative to plaintiff's acceptance of the offered promotional opportunity.

Plaintiff could not have been both laid off and promoted into a new probationary job status. Since he chose the latter course, I find that he impliedly rejected the alternative layoff status, and that upon the subsequent failure on probation was entitled to return to his permanent classification pursuant to Rule V, Sec. 4, and if there was no available job in that classification to exercise the rights specified for permanent employees by the provisions of Rule X, Subd. 3D. Assuming that the language in that section stating "designated for layoff" modifies "permanent employees," such a designation clearly applies to a permanent employee whose permanent job has been abolished.

Because it did not reclassify plaintiff to pay grade 39.5 and accord him whatever opportunities were available to him under that

classification, defendant violated its own rules to plaintiff's injury. Burnaman v. Bay City Independent School District, 447 F.Supp. 927 (S.D. Tex. 1978).

I have computed plaintiff's damages relying upon the figures set forth in Ex. 46, covering July 1979 - June 1980, and the accompanying computer printout covering July through December 1981, as follows:

Pay grade 27 (gym director) August 1979 - June 1980	= $ 9,600.00
Pay grade 27 July 1980 - May 1982	= 20,740.06
TOTAL	$30,340.06

The evidence with respect to attempts on the part of plaintiff to mitigate his damages is slight. Plaintiff testified that since he left the defendant's employ he has continued job counselling services in his home community, apparently gratuitously. He reports no earnings whatever from August 9, 1979, through the time of trial. Plaintiff testified that he applied primarily for jobs in the $1,500 - $1,600 per month range. He said that the lowest salaried job he applied for wa at the

College of San Mateo, an entry level job. There is no testimony that he even sought work in the pay range of the gym director or night clerk jobs. He failed of appearance for a job interview arranged at the suggestion of defendant for the night clerk position, a job for which he was admittedly qualified.

Because his efforts in mitigation of damage appear to be less than vigorous his damages will be reduced by a sum equal to one-half the sum previously computed, cf. Atcherson v. Siebenmann, 458 F. Supp. 526 (S.D. Iowa 1970), leaving a base figure of $15,170.03. From this sum must be subtracted the sum of $4,056.00, representing the sum paid to plaintiff as unemployment insurance, for a net damage figure of $11,114.03.

Plaintiff is not entitled to judgment upon his second or third causes of action.

The foregoing shall constitute Findings of Fact and Conclusions of Law. Fed R. Civ. P. 52.

The issue of attorney's fees is bifurcated for further hearing on the issue of

reasonableness.

Let judgment be entered accordingly.

DATED: July 23, 1982

WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK, and MIKE BEDWELL, City Manager of City of Menlo Park,

Defendants.

/

No. C-80-4369-WAI

J U D G M E N T

FILED JULY 23, 1982

ENTERED JULY 28, 1982

This cause came regularly on for trial before the Court, sitting without a jury, and the cause having been fully and fairly tried, argued and submitted, and good cause appearing therefor.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff ROBERT ALEXANDER have and recover of the defendant CITY OF MENLO PARK, upon his first cause of action only, the sum of $11,114.03, together with interest thereon at the rate of 7% per annum from and after the entry of this judgment, together with costs of suit actually incurred.

DATED: July 23,1982

WILLIAM A. INGRAM
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK, and MIKE BEDWELL, City Manager of CITY OF MENLO PARK,

Defendants.

_____/

No. C-80-4369-WAI

ORDER FOR NEW TRIAL AND SETTING ASIDE JUDGMENT

FILED OCTOBER 20, 1982

Plaintiff's Motion for New Trial having come on regularly for hearing before the undersigned, Louis A. Highman having appeared on behalf of plaintiff and John R. Cosgrove on behalf of defendants and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. The motion for new trial is granted on the issue of damages, including reinstatement, but not on any issue relating to liability.

2. The judgment in favor of plaintiff against defendant filed July 23, 1982 and entered on July 28, 1982 is set aside and

vacated.

3. Plaintiff's motion for attorneys fees shall be considered following the new trial on the damage and reinstatement issues.

DATED: _____, 1982

_____
William A. Ingram
U.S. District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK, and MIKE BEDWELL, City Manager of CITY OF MENLO PARK,

Defendants.

_____/

No. C-804369-WAI

MEMORANDUM OF DECISION

This matter came duly on for new trial on the issue of damages and the Court having considered the testimony, documentary evidence and the argument of counsel, now finds in favor of plaintiff on the issue of damages resulting from the violation of due process previously found by the Court, and assesses only nominal damages in favor of plaintiff in the sum of ONE DOLLAR ($1.00).

Plaintiff has abandoned his original claim for reinstatement. At trial two primary issues were presented to the Court:

1) Did plaintiff sustain actual injury sufficient to entitle him to compensatory damages where the wrong of which plaintiff

complains is a denial of procedural due process of law?

2) If plaintiff has shown his entitlement to compensatory damages, has defendant sustained its burden of proof in showing a want of reasonable diligence on the part of plaintiff to mitigate the damages found to be due him? The Court answers the first inquiry in the negative and by reason of that finding does not reach the issue of mitigation as encompassed within the second issue.

With respect to the first issue, it is the contention of defendant that plaintiff has incurred no compensable injury because the evidence preponderates in favor of the notion that plaintiff would not have bumped into the gym director position or the night clerk position if he had been advised of his right to do so.

. In Carey v. Piphus, 435 U.S. 247 (1978), the court held the recovery of more than nominal damages for a denial of procedural due process requires proof of actual injury, and approves the use of the tort measure of damages in cases

where the interest infringed by the claimed due process denial is an interest protected in parallel fashion by tort concepts.

In the instant case, the interest of plaintiff claimed to be infringed is that of holding a job and being paid the salary of such a job into which he would have bumped, but for the deprivation of procedural due process. Such an interest may also be cognizable under either tort or contract principles.

Other circuits have refused to allow damages in deprivation of procedural due process cases in the absence of proof of injury.[1] Where, on the other hand, a plaintiff proves actual substantive injury resulting from a denial of procedural due process, there is an entitlement to compensatory damages. Carey, supra.

Plaintiff suggested in argument at trial that the due process defect in issue here s substantive rather than procedural, and has previously suggested (Memorandum in Support of Motion for New Trial) that the defect, although procedural, deprived plaintiff of a substantive

right, that of holding the job into which he was entitled to bump. The Court is of opinion, as were both counsel until the time of argument at trial, that the failure of the City to adhere to its own rules constitutes a procedural violation. Vitarelli v. Seaton, 359 U.S. 535 (1959).

Implicit in plaintiff's damage claim is the question of whether or not plaintiff would have exercised his bumping rights if they had been offered. In assessing liability in this case, this Court held in its decision of July 23, 1982, that for purposes of establishing a violation of plaintiff's right under the rules promulgated by the City, whether plaintiff would have exercised his bumping rights or not was not of consequence. In the assessment of damages, however, it is of consequence, because in order to recover more than nominal damages, plaintiff must prove compensable injury. The conduct of the City in failing to accord plaintiff his bumping rights is only compensable if plaintiff was thereby denied a job which he would have otherwise taken. The burden is upon plaintiff

to prove the elements of his injury and resultant damages. Carey, supra; Wilson v. Taylor, supra.

A careful consideration of the evidence in this case does not convince the Court by a preponderance of the evidence that plaintiff would have taken the job of gym director or that of night clerk if he had been accorded the opportunity to bump into them. At the first trial of this action, plaintiff testified that he "might have been interested" in the positions.[2] At the retrial of the damage issue, plaintiff testified that "in retrospect" he would have taken the job of gym director. On cross-examination he testified that the period of "retrospect" was since the last trial. The testimony just referred to lack probative force.

The evidence elicited at the first trial very strongly suggests that plaintiff would not have bumped into either of the jobs available to him for bumping. As the Court pointed out in its first memorandum of Decision in this case, bumping into those jobs was wholly at variance with plaintiff's employment orientation as

revealed at the first trial. Nothing occurred at the second trial, other than plaintiff's testimony above referred to, to alter that evidentiary impression.

Plaintiff offered in evidence his answers to the first set of written interrogatories, specifically to interrogatory No. 5, which answers were filed herein on August 17, 1981, and a supplementary set of answers to the same interrogatory filed herein on April 21, 1983. Those answers set forth in 69 separate subparts efforts made by plaintiff to achieve employment from approximately August 1, 1979, up until the time of the retrial on the issue of damages, which was early May 1983. Of the 69 separate subparts, 34 set forth applications for specific positions and the rest are either related to unspecified positions or recount the making of inquiries or the circulation of resumes.

The specific job applications do not disclose the salary ranges of the specific position sought, but the job titles of many[3] demonstrate probable non-comparability with custodial jobs such as gym director and night

clerk (Exhibit SS). No answers reveal application for custodial or other lower level jobs comparable to gym director or night clerk except the night clerk application which was never perfected by submitting to interview, and possibly the applications made to savings and loan institutions. There is no evidence of the type of position sought at Hewlett-Packard, College of San Mateo, California State University at Hayward, California State University at San Francisco, Kaiser Aluminum, Bay View Savings and Loan, Home Savings and Loan, Stanford Research Institute, Stanford University, United Airlines, Sequoia Union High School District, Digital Equipment Corporation, Ray Chem Industries, IBM, Ampex, Foothill-DeAnza, Peralta Community College, except that at most of them a resume was left. From this circumstance, it may be inferred that plaintiff did not apply at those places for work comparable to gym director or night clerk, inasmuch as his resume discloses no such work experience. (Exhibit 55).

Richard Knowdell, testifying as an expert,

stated based upon his examination of plaintiff's resumes (Exhibit 55) that plaintiff was unqualified for 19 of the positions for which he applied, was qualified to fill 4 such positions, and that 7 of the employers listed had no jobs appropriate to plaintiff's skills as listed in his resumes. Knowdell stated that he had insufficient information upon which to form an opinion with respect to three of the listed applications. Witness Hall, also testifying as an expert, did not specifically express an opinion as to plaintiff's qualifications for the specific jobs listed.

Defendant has offered evidence to show a number of jobs for which it contends plaintiff was qualified, which were available to him, and were advertised in the local press and for which plaintiff did not apply. They are illustrated by Exhibits A-7; A-9, A-10, A-12, A-13, and A-14; A-34c A-44 (same job); A-41; B-8, B-9, B-10, B-11, B-13, B-15; B-10, B-12, B-14, B-16; B-1, B-30, B-59; and B-27. Exhibit A-7 is a newspaper ad appearing in the Peninsula Times Tribune for November 10, 1979, concerning the

job of youth recruiter in the South San Francisco, Daly City, Half-Moon Bay Area, requiring knowledge of special problems of disadvantaged youth and paying a salary of $1,040.00 per month. Exhibit A-9 is an ad for the position of job developer requiring job development experience and knowledge of the CETA program. It paid $10,744 to $14,196 annually and was located in East Palo Alto. The ad was published in the Peninsula Times Tribune on November 23, 1979. Exhibit A-10 was published in the Peninsula Times Tribune on November 24, 1979, and concerns the same job as does Exhibit A-9. Exhibit A-12, A-13, and A-14 concern the same job as does Exhibit A-9 and were published in the Peninsula Times Tribune on November 28, 29, and 30, 1979, respectively. Exhibit A-43 and A-44 each concern positions of placement specialists in a youth employment program situated in San Mateo County and required either a B.A. in social science or four years of experience in working with disadvantaged youth, and paid $1,263 per month. Exhibit A-43 and A-44 were published in the Peninsula Times Tribune

on April 19 and 21, 1980, respectively. exhibit A-41 concerns a job with the redwood City CETA program described as counselor-aide trainer and requiring a B.A. in counselling or a related filed or equivalent education and experience and paying $850 - $950 per month. Exhibit B-1, B-30 and B-59 each concern the position of vocational counselor with the Singer education division of the San Jose Job Corp., requiring a bachelor's degree and two years experience in career planning, job placement, or vocational counselling, for the purpose of counselling students age 16 through 21. Each of the exhibits were published in the San Jose Mercury news on September 23, 1979, June 15, 1980, and November 23, 1980, respectively. Kenneth Dugan testified that the salary level for the jobs advertised in Exhibit B-1, B-30, and B-59 was $850 -$950 per month. Exhibit B-8, B-9, B-11, B-13, and B-15 concern a position called counselor interviewer and were published in the Peninsula Times Tribune on March 25, 26, 27, and 29, 1980, respectively. Sharon Wemple testified that the job was in a training school

for the economically disadvantaged, that a bilingual ability was preferred, and that the job paid $16,000 per year. The job was with Opportunities Industrial center West of Menlo Park. Exhibit B-10 concerns a job called job developer also with OICW of Menlo Park, requiring developing jobs for graduates and paying $16,000 per year and not requiring bilingual ability (testimony of Sharon Wemple). Exhibit B-10 was published in the Peninsula Times Tribune on March 26, 1980. Exhibit B-16 is the same job as B-10 and was published in the Peninsula Times Tribune on March 31, 1980.

Exhibit B-27 concerns a job called administrative aid to CETA program coordinator, paid $17,234 - $20,966 annually, required a bachelor's degree in public administration, recreation administration, business administration or a related field and experience with CETA. It was published in the San Jose Mercury News on June 8,1 980, by the City of Sunnyvale. Defendant's expert Knowdell testified on cross-examination that based on the ad B-27, plaintiff would not be qualified for

the position and that it would not be unreasonable for him to fail to apply for it.

Yolanda Irigon, who gathered the exhibits above-referred to testified that they were selected because they appeared to match plaintiff's employment qualifications. She also testified that positions such as gym director and night clerk are not usually advertised, but that vacancies are made known in a less formal manner.

Therefore, the evidence reveals but little evidence that plaintiff searched for jobs comparable in pay and responsibility to those of gym director or night clerk. On May 4, 1983, plaintiff testified tnat he applied for part-time jobs with San Mateo County and with redwood City. He did not specify what the jobs were. He also stated that he applied to temporary job agencies. He specified neither the agencies nor the job. The answers to interrogatory No. 5 list no employment agencies other than "headhunters" which plaintiff testified were concerned with high technology jobs.

On cross-examination on May 4, 1984,

plaintiff testified that job listing No. 29, in the answers to first set of interrogatories was a part-time job. That job is described as counselling with Sequoia Union High School District. Plaintiff referred also to job No. 17, first answers, which are described as positions with the College of San Mateo. On the supplemental answers, plaintiff referred to job No. 6, the night clerk job with Menlo Park; job No. 8, instruction designer, College of San Mateo, which plaintiff said could have been part-time; job No. 11, production assistant, College of San Mateo, which plaintiff said could have been part-time and job No. 19, media service technician, Skyline College. Plaintiff does not know the pay ranges of any of the part-time jobs for which he applied, and there is no other evidence tending to show them. Plaintiff testified that many of the jobs for which he applied carried salaries in the range of $1,500 - $1,600 per month. It thus appears both from the evidence from the first trial and from the job-seeking efforts elicited in some detail during the second trial, that plaintiff's

employment orientation is not conformable with such jobs as gym director and night clerk. The episode regarding the night clerk interview, gone into in some detail at trial, illustrates this point. It was plaintiff's testimony that he sought to postpone his scheduled interview with the oral interview board in order that he might attend an "open house" conducted by Bank of America. Although the evidence is somewhat conflicting with respect to the exact content of the two telephone conversations which plaintiff had with employees of the City at that time, it is clear to the Court that the night clerk job took a "back seat" to the "open house". The scheduled interview for the job of night clerk was for September 30, 1982. The evidence before the Court indicates that in the jobs actually sought by plaintiff as reported in answers to written interrogatory No. 5 and the supplements thereto, and those which might have been available for him had he sought the positions as illustrated by the defense exhibits here and above-referred to involving the newspaper ads, reveals a considerable disparity

between the type of work in which plaintiff was interested and that which he might had been able to get in the lower pay ranges had he made the necessary applications. It is worthy of note that plaintiff testified that he systematically read the newspapers ads carried in local newspapers of general circulation.

Additionally, the Court carefully observed plaintiff's demeanor, method of testifying, and courtroom conduct during the course of the trial, all of which tend to reinforce the conclusion reached as set forth in this Memorandum of Decision.

It is therefore the opinion of the Court that plaintiff is entitled to recover nominal damages only and that such nominal damages such not exceed the sum of ONE DOLLAR ($1.00), c.f. Carey, supra.

The matter of attorney's fees still remains before the Court. The Court is satisfied that plaintiff's counsel is able and skilled in the field encompassed in this lawsuit and that he diligently represented his client's interest. On the basis of the declaration filed herein

setting forth counsel's background and experience, the Court is satisfied that he is entitled to be compensated at the rate of ONE HUNDRED DOLLARS ($100.00) per hour. The only question remaining is whether any division should be made in hours primarily devoted to preparation for trial on issues upon which plaintiff did not prevail or whether the issues are so interrelated that the work accomplished by counsel was equally applicable to all issues before the Court including the issue upon which plaintiff has prevailed as a matter of liability.

THE COURT THEREFORE ORDERS a further hearing upon the matter of attorney's fees to be conducted on August 22, 1983, at the United States Courthouse in San Jose, at 2:00 p.m. of that date.

DATED: 7-28-83

WILLIAM A. INGRAM
United States District Judge

FOOTNOTES

1/ County of Monroe v. U.S. Department of Labor, 690 F.2d 1359 (11th Cir. 1982); Laje v. A.E. Thomason general Hospital, 665 F.2d 724 (5th Cir. 1982); Wilson v. Taylor, 658 F.2d 1021 (5th Cir. 1981); Burt v. Abel, 585 F.2d 613 (4th Cir. 1978).

2/ The parties orally stipulated in open court that all testimony and exhibit from the first trial be admitted in the subsequent trial.

3/ Answers to interrogatory No. 5, Nos. 1, 2, 3, 6, 7, 8, 9, 12, 19, 20. Supplemental answers to interrogatories Nos. 1, 2, 3, 4, 5, 8, 9, 10, 11, 14, 17, 18, 20, 21, 23, 33.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK; MIKE BEDWELL, City Manager of City of Menlo Park,

Defendants.

_____/

No. C-80-4369 WAI

JUDGMENT

FILED MAY 26, 1984

ENTERED JUNE 14, 1984

This cause came regularly on for trial before the Court sitting without a jury, and the cause having been tried, argued, and submitted, and good cause appearing therefor,

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff ROBERT ALEXANDER have and recover of the defendant CITY OF MENLO PARK, upon his first cause of action only, the sum of $1.00 nominal damages. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff's counsel herein is awarded attorney's fees in the sum of $21,508 and costs in the sum of $744.18.

DATED: 5-24-84

Hon. William A. Ingram
United States District Judge

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

ROBERT ALEXANDER,

Plaintiff-Appellant,

v.

CITY OF MENLO PARK; Mike Bedwell, City Manager of City of Menlo Park,

Defendants-Appellees.

ROBERT ALEXANDER,

Plaintiff-Appellee,

v.

CITY OF MENLO PARK,

Defendant-Appellant.

---/

Nos. 84-2150, 84-2189

Argued and submitted June 11, 1985.

Decided April 24, 1986.

As Amended on Denial of Rehearing June 24, 1986.

Before BROWNING, Chief Judge, FARRIS and NELSON, Circuit Judges.

PER CURIAM:

Robert Alexander appeals a judgment against him on his Title VII claim and an award of only nominal damages on his section 1983 claim, in a suit against the City of Menlo Park, California. The City appeals the award of attorney's fees to Alexander's counsel. We affirm in part and reverse in part.

I.

Alexander, a black man, served as Youth Services Facility Director for Menlo Park. The City Council voted to abolish the position. Mike Bedwell, City Manager, offered Alexander the choice of being laid off or accepting a probationary promotion to the job of Recreation Supervisor II. Alexander accepted the new job.

During Alexander's probation, he had several confrontations with Mary Leydon, his department head. At the end of the probationary period Leydon found Alexander's performance inadequate and recommended he be terminated. Bedwell terminated Alexander.

Alexander sued, alleging causes of action under 42 U.S.C. §§ 1981 (1982) and 1983 (1982) and Title VII, 42 U.S.C. §§ 2000e-2 (1982) and 2000e-3 (1982).

After trial, the district court held Alexander had been denied procedural due process in violation of section 1983. The court ruled that when Alexander was terminated from the probationary position, under City rules he "had a right to be returned to" his earlier job or

another at the same level; and, if no such job was available, he "was entitled to bumping rights." The court found Alexander had been wrongfully denied these "bumping rights" as to the jobs of gym director or night clerk. The court computed Alexander's back pay award at the level of these jobs, divided the amount by two "[b]ecause his efforts in mitigation of damages appear to be less than vigorous," subtracted the amount already paid to Alexander as unemployment insurance, and awarded Alexander $11,114.03.

The court rejected Alexander's Title VII claim because he had failed to rebut the City's evidence of nondiscriminatory employment practices and had offered no evidence of retaliatory discharge. The court rejected Alexander's section 1981 claim without discussion.

On Alexander's motion, the court ordered a new trial confined to the issue of damages. After trial, the court reduced the damage award to one dollar on the ground that the City's failure to accord Alexander the right to bump into the gym director or night clerk jobs cause

no "compensable injury" because he would not have taken either job. The court awarded Alexander $21,508 in attorney's fees and $744.18 in costs. Both sides appeal.

II.

City Rules provide that a probationary "employee deemed unsatisfactory for [appointment to the permanent] position shall return to prior classification and non-probationary status." Alexander therefore had a right to be returned to a job in the same classification as his prior job. However, as noted, the City Council had abolished the position of Youth Services Facility Director and the City had no other position in that classification.

Alexander contends his former position was not "formally" abolished at the time he should have been returned to it after failing the probationary promotion. The record shows unequivocally, however, that the City Council abolished the position of Youth Service Facilities Director before Alexander accepted the promotion. The Council did not have to do so again.

III.

Since Alexander could not be returned to his original job or one in the same classification, he was entitled under City Rules either to bumping rights or, if he had no bumping right or chose not to exercise them, to severance pay.

City Rules would permit Alexander "to displace a less senior employee in the same department who occupies a position which the more senior employee is qualified to occupy in the judgment of the department head" unless the department head and City Manager determine that the less senior employee has special skills such that displacement would impede or impair the operation of the department.

The district court found Alexander could not bump into the Recreation Supervisor I position held by Aaron Johnson, because "neither [Leydon nor Bedwell] would have approved [his] displacement of Aaron Johnson or of any employee outside of the ... department."

Although the district court's language did not track City Rules exactly, it is evident the

court found the Bedwell and Leydon had determined Alexander was not qualified for the job of Recreation Supervisor I and that Johnson had "special skills" without which the operation of the department would be impaired.

[1] The evidence before the court was sufficient to support such findings. Leydon testified Alexander was not qualified for the Recreation Supervisor I job in part because he did not know how to prepare lesson plans which were an important part of the job. (It was largely because of this inability that she had recommended Alexander be terminated from his probationary position.) She also testified the Recreation Supervisor I job required developing a new program and was more difficult than the Recreation Supervisor II job, which involved working with existing programs. She doubted Alexander's ability to work far from close supervision and assistance and to fit in at Belle Haven, a predominantly black community, because of his view that that community was treated differently from the rest of the city.

In contrast, the only evidence suggesting

Alexander was qualified was his past experience and receipt of favorable recommendations as Youth Service Facility Director (offset by Bedwell's testimony that Alexander had not performed well in that position) and his promotion by Bedwell and Leydon to Recreation Supervisor II. Alexander offered only uncorroborated testimony that as Youth Service Facilities Director he successfully developed new programs, and hired and supervised assistants.

Johnson's special skills included a masters degree in Recreation Administration, special talent dealing with children and preparing programs for them, and the "ability to deliver information to the City Council ... regarding the post." Leydon testified she "couldn't have been more pleased" with his work and her testimony suggested replacing him would interfere with the working of the Parks Department. Alexander offered no evidence to the contrary.

IV.

The district court held Alexander was

wrongfully deprived of his right to bump into the next less-senior classification - specifically, the job of gym director or night clerk.

[2,3] Alexander had a legitimate claim of entitlement to bumping rights to particular positions under City Rules, and thus a constitutionally protected property interest. See Board of Regents v. Roth, 408 U.S. 564, 576-77, 92 S.Ct. 2701, 2708-09, 33 L.Ed2d 548 (1972). Under the test established by Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976), Alexander was deprived of that property interest without due process. The weight of "the private interest," id., involved was substantial-Alexander's opportunity to continue his employment, maintain his income, and protect his reputation. See, e.g., Jordan v. City of Lake Oswego, 734 F.2d 1374, 1376 (9th Cir.1984). The "risk of an erroneous deprivation," Mathews 424 U.S. at 335, 96 S.Ct. at 903, was also substantial. Bedwell testified he did not offer Alexander bumping rights as to the jobs of gym director or night

clerk because he thought Alexander would feel "demean[ed and] angry." Such subjective assessments of another's potentional emotional reactions are often inaccurate. Alexander himself testified that he would have accepted the jobs. The "[g]overnment's interest," Mathews, 424 U.S. at 335, 96 S.Ct. at 903, in the procedure followed was negligible. Neither the financial nor operational cost of affording Alexander the opportunity to take one of the two jobs was significant.

The City argues that Alexander suffered no loss because he would not have accepted either of the two available positions had they been offered. Whether Alexander suffered loss, however, has no bearing on whether he was denied due process. See Carey v. Piphus, 435 U.S. 247, 266, 98 S.Ct. 1042, 1053, 55 L.Ed2d 252 (1978).

The City's claim that Alexander knew his bumping rights but chose not to exercise them is also unavailing. The record strongly suggests Alexander was unaware of his bumping rights and therefore unable to exercise them.

[4] Nor did Alexander fail to exhaust his

right to an administrative appeal. None was available to him. City Rule did not permit an appeal from a failure of probation, a layoff, or an informal discharge. Only a formal discharge is appealable, and a denial of bumping rights cannot be so characterized. Further, exhaustion of remedies is not required under section 1983. Monroe v. Pape, 365 U.S. 167, 183, 81 S.Ct. 473, 481, 5 L.Ed.2d 492 (1961).

[5] We also reject the City's claim that Alexander had already been given bumping rights when his original position was abolished and therefore was not entitled "to further reemployment right at the expense of another employee" when he failed his probationary employment. Alexander was given no bumping rights when his original position was abolished-he was not laid off but provisionally promoted. Moreover, even if he had received bumping rights when his position was abolished he was nonetheless entitled to such rights when finally terminated; under the Rules bumping rights were mandatory whenever an employee was laid off.

[6] The district court originally held

that whether Alexander would have taken the gym director or night clerk job was relevant to mitigation of damages and on this issue the City had the burden of proof. At the new trial, however, the court held Alexander had the burden of proving he suffered compensable injury by showing he would have taken one of the two jobs if offered. We agree with plaintiff that the court erred when it shifted the burden of proof.

The due process violation was the failure of the defendants to inform the plaintiff of his right to bump into the job of gym director or night clerk. The injury suffered by plaintiff was unemployment. Whether Alexander would have exercised his bumping rights with respect to one of these jobs, had be been informed of them, raises the question whether the violation was the proximate cause of the injury.

Where a public employee is terminated without just cause, the question of proximate cause does not arise because the violation is so closely connected to the harm suffered. Where, on the other had, a public employee is terminated with cause, but without required

procedural protections (e.g., a hearing), the question of proximate cause arises - would the employee have been terminated even if the property procedures had been observed? In such cases the Supreme Court has approved the placement of the burden of proof on the party who committed the violation. See Carey v. Piphus, 435 U.S. at 260, 98 S.Ct. at 1050.

[7] We have followed the same rule in cases under Title VII. Where a plaintiff has proven unlawful discrimination in hiring or promotion, it is the defendant's burden to prove plaintiff would not have been hired or promoted even absent the discrimination. Nanty v. Barrows Co., 660 F.2d 1327, 1333 (9th Cir.1981); League of United Latin American Citizens v. City of Salinas Fire Department, 654 F.2d 557, 558-59 (9th Cir. 1981). The reason for this rule is simple: "The burden of showing that proven discrimination did not cause a plaintiff's rejection is properly placed on the defendant-employer because its unlawful acts have made it difficult to determine what would have transpired if all parties had acted properly."

League, 654 F.2d at 559.

Alexander proved the defendants violated his due process rights by failing to inform him he could bump into either of two positions. The burden is on the defendants to show Alexander would not have accepted either position absent their unlawful conduct. Because the district court improperly imposed the burden of proof on this issue on Alexander, we remand for a determination under the proper standard. See Muntin v. California Parks and Recreation Department, 671 F.2d 360, 363 (9th Cir. 1982).

[8] On remand, the district court should also determine whether Alexander suffered emotional distress as a result of the denial of his bumping rights. Harm due to "mental and emotional distress" is clearly "compensable under 42 U.S.C. § 1983," providing the plaintiff "demonstrate[s] that [his] injury resulted directly from the wrongful deprivation of due process." Jones v. Los Angeles Community College District, 702 F.2d 203, 207 (9th Cir. 1983); see also Carey v. Piphus, 435 U.S. at

264, 98 S.Ct. at 1052.

V.

[9] Alexander's Title VII claim alleged a failure to inform him of available higher paying jobs, retaliation for filing a complaint with the EEOC and criticizing the City's affirmative action program, and discriminatory treatment with respect to training and performance reviews. The district court held,

> [A]ny inference of discrimination was ... wholly rebutted by the heavy weight of the evidence, which shows defendant to have conducted personnel practices in a fashion wholly free of racial bias or discriminatory intent...
>
> [P]laintiff's failure of probation was not the result of retaliatory discrimination, but of plaintiff's failure, after repeated notice, to perform a significant part of his job.

These findings are not clearly erroneous. In short, Alexander failed to show any causal link between his protected activity - his complaints and EEOC charges - and defendants' failure to advise him of his bumping rights. See Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir.1982). There is ample evidence that the reasons behind any adverse employment action were Leydon's assessment of Alexander's

abilities and perhaps a fair, if mistaken, belief that Alexander was no entitled to bumping rights.

VI.

Because we remand for further proceedings that may affect the result, we do not reach the City's cross-appeal concerning attorney's fees. The award of attorney's fees is vacated, and the parties may present their contentions to the district court.

AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK and MIKE BEDWELL, City Manager of the City of Menlo Park,

Defendants.

_____/

No. C-80-4369-WAI

O R D E R

FILED SEP 13 1988

This case came duly on for trial on June 9, 1988, pursuant to remand on certain issues from the United States Court of Appeals for the Ninth Circuit.

The issues tried are (1) whether defendants sustained their burden of proof that plaintiff incurred no injury proximately resulting from a violation by defendant of his due process rights, and (2) whether plaintiff suffered emotional distress as a result of the denial of defendants of his due process rights.

Plaintiff is entitled to prevail upon both issues. Plaintiff's testimony with respect to whether he would have exercised his right to bump into the night clerk job is equivocal, RT

249 lines 1-15, but does not foreclose the possibility that he may have done so; plaintiff elected not to appear for interview for the night clerk job when it was offered subsequent to his termiantion, RT 249 line 17-251 line 22, electing instead to attend another interview with a different employer scheduled for the same time.

Plaintiff testififed that he "might possibly have been interested" in the gymnasium director job, which was created within two years of plaintiff's termination. RT 271 lines 18-24.

The evidence does not, by a preponderance, negate the contention that plaintiff would have exercised his bumping rights had they been accorded to him.[1]

It is clear that the testimony at trial, and at trial after remand, supports the contention that plaintiff incurred emotional distress as a proximate result of the denial by defendant of his due process rights to bump into other positions. RT 188 line 24 - 191 line 1;

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1 Reliance is placed upon testimony elicited prior to the trial after remand.

testimony of Dr. Wendell Lipscomb. Whether the totality of that emotional distress proximately results from any act of defendants or from matters incident to this proceeding, or from other causes is not clear.

The court will hear further evidence on the issue of damages on November 7, 1988, at 10:00 a.m.

Counsel should be prepared to argue the question of proximate cause as it pertains to the emotional distress issue.

DATED: 9-12-88

WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK, and MIKE BEDWELL, City Manager of CITY OF MENLO PARK,

Defendants.

_____/

No. C-80-4369 WAI

MEMORANDUM OF DECISION

FILED AUG 02 1989

The trial of damage issues following remand was duly conducted, without a jury, on January 23, 1989, and the court now renders its decision in the form of this memorandum and in compliance with Fed. R. Civ. P. 52,

Defendant City of Menlo Park is the only defendant now before the court, the other defendant having been found to be without liability by this court's decision of July 23, 1982.

The court has previously found in favor of plaintiff on the issue of liability by its decision dated September 12, 1988.

The issue of damages concerns what sum of money damages will fairly compensate plaintiff

for economic injury and emotional distress proximately caused by the procedural due process violation committed by defendant through a failure to accord plaintiff his "bumping" rights pursuant to the provisions of Personnel Rule X Subd. 3D of the City of Menlo Park.

Defendant has not demonstrated by a preponderance of the evidence that plaintif would not have exercised his bumping rights into the position of gym director had the provisions of Rule X Subd. 3D been adhered to.

Plaintiff is therefore awarded a sum equal to the product of the gym director salary times the number of months elapsing between the cessation of plaintiff's employment with defendant, and his next employment, which is the period between July 30, 1979 and April 1983. In April 1983 plaintiff was employed by the City of East Palo Alto as Superintendent of Parks and Recreation.

This court previously found in its decision dated July 23, 1982, that plantiff would have earned $30,340.06 as gym director between July 30, 1979 and May of 1982. Plaintff would have

earned $11,212.35 as gym director between June of 1982 and April of 1983. (See Pay Ranges for Classified Miscellaneous Personnel, in evidence).

Thus, the toal which plaintiff would have earned if he had bumped into the gym director job is $41,552.41.

Plaintiff's expert, Dr. Hall, testified that if plaintiff had been returned to Pay Classification 39.5, and then exercised his bumping rights in accordance with the Rule, other opportunities would have become available to him by reason of his permanent classification at Grade 39.5. Whle this may be true, there is insufficient evidence to justify a finding of when such opportunities may have presented, what pay rate would have been applicble and what such an opportunity would be. The court will not conjecture with rspect to that, and will confine its award to that which is clearly in evidence.

In April 1983 plaintiff resigned his post with East Palo Alto. He had done well in the job as evidenced by a resolution of the East Palo Alto City Council praising plaintiff's

performance. Ex. 19. His reason for resigning was that his post brought him into contact with City of Menlo Park personnel, which reminded him of his denial of due process by the City of Menlo Park. (Testimony of Dr. Campbell, Feb. 5, 1988), and because he was overwhelmed by a decision of this court which awarded him token damages of $1.00. (Testimony of Plaintiff, Feb. 5, 1988). Except for a four month consulting job in 1986, Ex. 15, plaintiff has not worked since.

Plaintiff has sustained emotional distress at least in substantial part proximately resulting from the denial of procedural due process. (Testimony of Dr. Campbell, Robin Mather, Mrs. Alexander, and Plaintiff). In some part plantiff's distress is due to his profound dissatisfaction with prior rulings of this court, but a substantial part of it is due to his reaction to the events of June 1979 which plaintiff perceives as a betrayal by the system in which plaintiff believes.

The court will award plaintiff general damages of emotional distress in the sum of $100,000 and special damages in the sum of

$3,684.00 (Exs. 16, 17 and 18).

The court will award front money in lieu of reinstatement in the sum of $10,000 for the purpose of vocational training.

The court wil award plantiff $44,552.41 for wage loss between the period July 30, 1979, and April 1983.

The court awards no damages for alleged wage loss following plaintiff's resignation from his East Palo Alto emloyment because the weight of the evidence does not favor by a preponderance the conclusion that plaintiff's failure to obain employment was directly and proximately caused by emotional distress which in turn proximately resulted from a denial of procedural due process by defendants. Instead, the evidence supports the conclusion that plaintiff, having founed a well paying job suitable to his talents and abilities, gave it up because of dissatisfaction with a ruling made by this court, and not because of any act of defendant. Carey v. Piphus, 435 U.S. 247 (1978) requires that a particular injury, in order to be compensable under § 1983,

proximately arise from a denial of procedural due process by the defendant.

Plaintiff is entitled to recover actual costs and reasonable attorneys fees, bearing in mind that defendant prevailed on two of the three claims asserted against it.

DATED: 8-2-89

WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK, and
MIKE BEDWELL, City Manager
of CITY OF MENLO PARK,

Defendants.

_____/

No. C-80-4369 WAI

JUDGMENT

FILED AUG 2 89
ENTERED AUG 4 89

This cause having come duly on for trial and having been fully and fairly tried and good cause appearing therefore,

IT IS ORDERED, ADJUDGED and DECREED that plaintiff Robert Alexander recover of the defendant City of Menlo Park the sm of One Hundred Fifty-eight Thousand Two Hundred Thirty-six Dollars and Forty-one Cents ($158,236.41) together with post judgment interst computed in accordance with the provisions of 28 U.S.C. § 1961, together with actual costs and reasonable attorneys fees.

DATED: 8-2-89

_____
WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK,

Defendant.

_____/

No. C-80-4369-WAI

FILED MAR 29 90

FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

The motions of plaintiff and defendant for new trial are DENIED. The motions of plaintiff and defendant for the amendment of findings, the making of additional findings, and the amendment of judgment are GRANTED and DENIED to the extent provided by this Order. The Memorandum of Decision filed August 2, 1989 is amended to conform to this Order. An amended judgment shall be entered accordingly.

The court makes Findings of Fact and reaches Conclusions of Law as follows:

By the terms of the remand order of the United States Court of Appeals for the Ninth Circuit, [Alexander v. Menlo Park, 787 F.2d 1371

(9th Cir. 1986)], this court is required to make the following determinations:

1. Did the defendant City sustain its burden of proving that plaintiff would not have accepted the positions of gym director or of night clerk even if he had been properly tendered the opportunity to "bump" into them, or either of them?

2. Did plaintiff suffer emotional distress as the proximate result of the denial of his bumping rights?

Following remand in July, 1986, plaintiff moved on Febraury 26, 1987, to set a date for further trial. Following extensive briefing, this court on Septemgber 27, 1987, made an order defining the manner of proceeding for the resolution of issues pursuant to remand, and the matter came on for hearing on June 9, 1988. On September 13, 1988, this court filed its order determining that plaintiff is entitled to judgment on the issues of whether he would not have exercised his bumping rights and whether he sustained emotional distress as a proximate result of the defendant's denial of

plaintiff's right to procedural due process oflaw. Further trial was set on the issue of damages for November 8, 1988, and the matter actually proceeded on January 23, 1989. A decision was rendered on August 2, 1989. Subsequently, both sides moved for new trial, for additonal findngs and for alteration or amendment of judgment. Oral argument was heard on November 6, 1989.

The motions for new trial are DENIED. The motions to alter or amend judgment to amend findings and to make additional findings are GRANTED as follcws:

1. Plaintiff's claim for damages now before the court does not arise from wrongful termination of plaintiff's employment with defendant. It has been previously determined that plaintiff's termination from employment was not wrongful. [Decision of July 23, 1982; Alexander v. Menlo Park, 787 F.2d 1371.]

Plaintiff's claim arises entirely from the failure of defendant to accord plaintiff the opportunity to bump into either of two positions, gym director or night clerk, and from

any damages to plaintiff proximately caused by emotional distress sustained by plaintiff and proximately resulting from the wrongful failure to accord plaintiff bumping rights. In other words, plaintiff is not entitled to recover damages for emotional distress occasioned by some occurrence or event other than the wrongful denial of bumping rights.

FINDINGS OF FACT

1. In its decision of July 28, 1983, this court did not reach the question of mitigation of damages, and that decision consequently made no finding on that issue.

2. Following its decision of July 23, 1982, this court granted plaintiff's motion for new trial, but on the issue of damages alone. Therefore, the decision of July 23, 1982 has no significance and does not constitute the law of the case on that issue.

3. Defendant City paid $4,056.00 to the State of California on account of plaintiff's unemployment, and plaintiff received that exact sum from the State of California as unemployment compensation.

4. Defendant did not establish by a preponderance of the evidence that plaintiff would not have taken the gym director position or the night clerk position if the opportunity to bump into those positions had been properly tendered to plaintiff.

5. Plaintiff did not receive bumping rights pursuant to Rule X, Section 3(D), nor did he receive two weeks severance pay and placement on a re-employment eligibility list pursuant to Rule X, Section 3(F) or Rule IV, Section 3.

6. Plaintiff was offered no positons in the two-year period subsequent to his layoff by defendant City, although plaintiff, on the basis of his resume only, was qualified for some vacant positions.

7. The court makes no finding as to whether plaintiff was or was not qualified to perform the duties of any such vacant positons with defendant City because the evidence in the case both as to substance and as to probative force will not support a finding. The court will not conjecture with respect to plaintiff's reasonable probability of obtaining jobs such as

Human Services Coordinator through defendant City's reemployment eligibility list maintained under Rule X.

8. The testimony of plaintiff's expert T. Hensley Williams elicited on January 19, 1989 and appearing at RT 82:15 - 83:12 that where an employee is in a layoff mode and bumps into a lower positon, he or she can pretty much look forward to "some movement" within eighteen months to two years. By this Mr. Williams meant that if such an employee stayed on the job and did a good job in the job into which the employee bumped, possibilities of internal promotion or transfer within eighteen months to two years were enhanced. This testimony does not aid the court in fixing the applicable period of back wages at less than the entire period of initial unemplyment because in the instant case plaintiff was denied the very advantage which constitutes the witness's predicate.

9. Plaintiff's loss of earnings as gym director between August 1, 1979 and April, 1983, is a sum equal to the product of the gym

director salary times the number of months elapsing between August 1, 1979 and April 1983.

10. The amount of fringe benefits lost by plaintiff during the period between August 1, 1979 and April, 1983, is a sum equal to the salaries payable to gym director during that period times eighteen percentum.

11. The amount of pre-judgment interest earned upon an award calculated in accordance with Findings 9 and 10 is a sum equal to the sum of the amount of interest which is derived from multiplying the salary at the several levels which plaintiff would have earned between August 1, 1979 and April, 1983, by the 52 week Treasury Bill Rate closest to the midpoint of the period in which plantiff would have received each such salary level within the gym director classification, and takng the sum of each of the amounts of interst so derived. Such interest shall be compounded and added to principal on March 31 of each year from 1980 - 1989 and finally on the date of judgment.

12. Plaintiff is entitled to a judgment in an amount equal to the sum of back pay, loss of

fringe benefits and pre-judgment interest calculated in a manner consistent with findings 8, 9 and 10.

13. On the issue of mitigation of damages, the defendant City has the burden of proof.

14. Defendant City has failed to sustain its burden of proof.

15. Defendant City offered in evidence, through Yolanda Irigon, a compilation of jobs which were advertised in the public press falling within four general categories:

A. Youth Development-Counselling. (Book A)

B. Employment Placement and Counselling. (Book B)

C. Community Service. (Book C)

D. Recreation. (Book D)

16. Defendant offered the testimony of Robert L. Knowdell, a vocational consultant and career counsellor, who testified as an expert with respect to the qualifications of plaintiff as revealed in his resumes for positions advertised in Books A, B, C and D, and with respect to plaintiff's lack of qualification as

revealed in his resume for many of the jobs for which plaintiff applied. Knowdell testified on May 5, 1983. His testimony is contained in RT Vol. 8, pages 763 - 787; 796 - 858.

17. In assessing plaintiff's qualifications for particular jobs or plaintiff's lack of qualification, Knowdell relied on plaintiff's resume covering the pertinent time period and the job description or advertisement, if any, for the particular job under consideration.

18. In evaluating plaintiff's qualifications for the jobs for which plaintiff applied, in many cases Knowdell opined based upon his own belief with respect to the availability with the particular employer of jobs for one of plaintiff's background and experience.

19. Knowdell testified that based upon plaintiff's resume, he would not believe plantiff to be qualified for the position which plaintiff ultimately got, that of General Manager/Superintendent of the Ravenswood Recreation and Parks District.

20. Knowdell stated that plaintiff may have had personal qualities, course work and/or experience which were not revealed in his resume and which may have rendered him qualified for positions.

21. Plaintiff testified with respect to his job hunting activities, stating that over the period between his leaving his employment with defenfant City and his subsequent employment with the Ravenswood Recreation and Parks District, he devoted 8 - 10 hours per week to his job seeking activities: Plaintiff offered evidence of more than thirty job applications filed by him, stating that he was a "finalist" for two of the jobs, and was successful ultimately in obtaining a job.

22. Plaintiffs choice of job - openings for which he applied, many of which were at a leval equal to or higher than plaintiff's last position with defendant City is reasonable.

23. During his period of unemployment, plaintiff improved his skills and qualifications by obtainingg a teaching certificate and completing work which resulted in the award to

plaintiff of a Master of Arts Degree.

24. Robert Hall, an expert witness called by plaintiff testified that plaintiff's job seeking eforts over a three and one-half year period were more diligent than those normally demonstrated.

25. Plaintiff performed creditably in his position with the Ravenswood Recreation and Parks District, and left that position voluntarily for reasons which do not appear to the court to be causally related to a denial of procedural due process.

26. Plaintif stated as a reason for his resignation from the Ravenswood job was a decision of this court and plaintiff's inability to have contact with officials of defendant City, as he was required to do in the Ravenswood job.

27. Following his resignation from the Ravenswood job, plaintiff had no further employment, except for consulting work which he performed in 1986 for Bayshore Employment Service and for the City of East Palo Alto.

28. Plaintiff has sustained emotional

distress as a direct and proximate result of the failure of defendant City to offer his bumping rights.

29. Dr. Wendell P. Lipscomb testified:

A. "...(T)here was a very violent reaction to the fact that he did not know what his rights were and they were not offered to him. And this is very, very traumatic and shocking to him."

Q. When you were looking at the event that really constituted the trauma, the initial original trauma that really set him off, was that the actual event?

A. The actual event was the initial having the job rubbed out and being fired.

Q. And that occurred at the same time as not being offered bumping rights and thrown out in the street are you aware of that?

A. I have assumed that yes. I haven't seen it but ....

Q. And is that event of therefore not being offered bumping rights and being thrown out in the street important in your analysis....

A. Yes.

Q. ... of his emotional distress?

A. Yes.

30. Dr. Campbell testified:

Q. Do you believe he has suffered any emotional distress as a result of his being terminated from employment by Menlo Park without being offered his due process bumping rights?

A. Yes I do.

Dr. Campbell testified that the factors of the diagnosis were:

1. What plaintiff considered to be the wrongful termination of his job.

2. Plaintiff's failure to receive due process after termination.

3. The results of his litigation.

Dr. Campbell testified that when plaintiff discovered that he had failed to receive the due process which he thought was guaranteed to him, his major problems began. Dr. Campbell feels that plaintiff is obsessed with all that happened to him incident to the termination of his employment with defendant City including denial of his bumping rights.

31. There is no evidence tending to show that plaintiff sustained no emotional distress as a result of the loss of his bumping rights.

32. The evidence, taken as a whole, supports the inference that plaintiff sustained emotional distress as a result of being terminated from his employment with defendant City, as a result of being denied his bumping rights, as a result of news stories published in the press and as a result of various court decisions incident to the trial of this action. Only the loss of bumping rights gives rise to a compensable injury in this case. Alexander v. Menlo Park, 787 F.2d 1271.

33. The court must apportion any sum awarded as damages for emotional distress proximately caused by the denial of procedural due process to reflect the relative causal impact of the failure to tender bumping rights and that of other factors such as abolition of plantiff's class 39.5 job, his termination of employment by defendant City, allegedly derogatory articles in the press concerning plantiff, and plaintiff's reaction to adverse

judicial decisions in this case by this and other courts.

34. The court finds that the relative causal force of each of the above is:

Termination of employment - 60%;

Reaction to publicity and judicial decisions - 30%; and

Loss of bumping rights - 10%.

35. The court finds that plaintiff is entitled to the sum of $10,000 as general damages for emotional distress.

36. Plaintiff is entitled to special damages for expenses and bills incurred for medical and psychological treatment necessarily and reasonably incurred and as a proximate result of the due process violation in the amount of $4,114.53, and to an additional sum for medical and psychological treatment reasonably expected to be incurred in the future in the sum of $960.00.

37. Plaintiff is entitled to an award of reasonable attorneys fees pursuant to 42 U.S.C. § 1988. The amount of reasonable attorneys fees shall be determined at a hearing to be held

hereinafter.

CONCLUSION OF LAW

1. This court has jurisdiction of this cause pursuant to the provisions of 28 U.S.C. § 1343 and of 42 U.S.C. § 1983.

2. There is no dispute between the parties as to jurisdiction or venue.

3. Plaintiff has prvoen his claim that he was denied procedural due process of law by defendant City by reason of defendant City's non-compliance with its duly adopted Personnel Rules which required that plaintiff be accorded bumping rights upon layoff.

4. Defendant has not proven by a preponderance of the evidence that plaintiff would not have exercised his bumping rights if the same had been accorded to him in accordance with the Personnel Rules, specifically Personnel Rule X, Subdivision 3D. Defendant has the burden of proof upon that issue. Alexander v. City of Menlo Park, 787 F.2d 1371.

5. Failure to offer bumping rights in accordance with defendant City's Personnel Rules is a violation of procedural due process for

which plaintif is entitled to recover damages under 42 U.S.C. § 1983. The deprivation of bumping rights proximately caused plaintiff to lose the income and benefits of the position of gym director, which was the best paid of the two positions into which plaintiff could have bumped, from August 1, 1979 until April 1, 1983. That deprivation is within the purview and purpose of 42 U.S.C. § 1983, and is compensable in damages. Carey v. Piphus, 435 U.S. 247 (1977).

6. Defendant has the burden of proof on the issue of mitigation of damages. Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978).

7. Defendnat has failed to sustain its burden of proof on the issue of mitigation of damages.

8. Plaintiff is entitled to prejudgment interst on the sums awarded herein as compensatory damages for lost wages and benefits. Cf. Ford v. Alfaro, 785 F.2d 835 (9th Cir. 1986).

9. Mental and emotional suffering caused

by denial of procedural due process is compensable in damages. Carey v. Piphus, 435 U.S. 247 (1978); Dykes v. Hoseman, 743 F.2d 1488, 1500 (11th Cir. 1984) on reh'g, 776 942, on remand, 783 F.2d 1000.

10. Where emotional distress is proximately caused by several acts or omissions some of which are compensable and some of which are not, the trier of fact may apportion the damages according to the relative percentage of repsonsibility of a particular tort feasor. Mairena v. Foti, 816 F.2d 1061 (5th Cir. 1987); Wilson v. Taylor, 658 F.2d 1021 (5th Cir. Unit B. 1981), appeal after remand, 733 F.2d 1539 (11th Cir. 1984).

11. A plaintiff complaining of denial of procedural due process may only recover damages proximately caused by such a denial. Carey v. Piphus, 435 U.S. 247; Wilson v. Taylor, 733 F.2d 1539.

12. Unemployment insurance payments to plaintiff are not deductible from plaintiff's damages. Restatement 2d Torts, Section 920(A)(2) (1979); National Labor Relations Board

v. Gullet Gin Co., 340 U.S. 361 (1951).

13. Plaintiff is entitled to judgment against the defendant City in a total sum equal to that derived as set forth in Findings of Fact numbered 9, 10, 11 and 12, plus the sums set forth in Findings numbered 35 and 36.

Plaintiff is awarded his costs of suit actually incurred and reasonable attorneys fees to be determined after hearing.

Counsel for plaintiff shall prepare a form of judgment consistent with these Findings and Conclusions.

Let judgment be entered accordingly.

DATED: March 29, 1990

WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

vs.

CITY OF MENLO PARK, et al.,

Defendants.

/

No. C-80-4369-WAI

JUDGMENT AMENDING JUDGMENT ENTERED AUGUST 4, 1989

FILED APR 25, 1990
ENTERED APR 25, 1990

This cause having come on duly for trial and was fully and fairly tried. Good cause appearing therefore, the Judgment entered herein on August 4, 1989 is amended to read as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff Robert Alexander recover of the City of Menlo Park the sum of One Hundred Twenty Two Thousand Four Hundred Seventy Six Dollars and Fifty Three Cents ($122,476.53), together with post judgment interest from August 4, 1989 computed in accordance with the provisions of 28 U.S.C. Section 1961, together with actual costs and reasonable attorneys fees. City of Menlo Park shall receive credit against the foregoing

for all sums paid on account after August 4, 1989.

Dated: April 24, 1990.

William A. Ingram, Judge of the United States District Court

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

vs.

CITY OF MENLO PARK, et al.,

Defendants.

_____/

No. C-80-4369-WAI

FINDINGS OF FACT AMENDING FINDINGS FILED MARCH 29, 1990

FILED MAY 7, 1990

The Findings of Fact filed March 29, 1990 are amended as follows:

1. Finding 5 is amended to read as follows: "Plaintiff did not receive bumping rights pursuant to Rule X, Section 3(b)."

2. Findings 6 and 7 are deleted.

3. The equities of the present case require computation of pre-judgment interest according to the 52 week Treasury Bill rates used in the Alternative Method in the Amended Declaration of Paul J. De Gregorio, i.e. the midpoint of the six fiscal years from April 1, 1983 to April 1, 1989 and the midpoint of the period from April 1, 1989 to August 4, 1989, rather than the 52 week Treasury Bill rates in

effect during the back pay period. Fifty-two week Treasury Bill rates were on the average much higher during the back pay period than during the following six years four months to the August 4, 1989 judgment. The Alternative Method is necessary to avoid inequitable and excessive pre-judgment interest in the present case. The City of Menlo Park did not cause and was not responsible for delays in resolution of the present action and should not be punished by the imposition of an inequitable pre-judgment interest rate far in excess of average 52 week Treasury Bill rates during the six year four month period.

Dated: May 3, 1990.

William A. Ingram, Judge of the
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK,

Defendant.

_____/

No. C-80-4369-WAI

FILED JULY 20, 1990

AMENDED
FINDINGS OF FACT
AND
CONCLUSIONS OF LAW

The motions of plaintiff and defendant for new trial are DENIED. The motions of plaintiff and defendant for the amendment of findings, the making of additional findings, and the amendment of judgment are GRANTED and DENIED to the extent provided by this Order. The Memorandum of Decision filed August 2, 1989 is amended to conform to this Order. An amended judgment shall be entered accordingly.

The court makes Findings of Fact and reaches Conclusions of Law as follows:

By the terms of the remand order of the United States Court of Appeals for the Ninth Circuit, [Alexander v. Menlo Park, 787 F.2d 1371

(9th Cir. 1986)], this court is required to make the following determinations:

1. Did the defendant City sustain its burden of proving that plaintiff would not have accepted the positions of gym director or of night clerk even if he had been properly tendered the opportunity to "bump" into them, or either of them?

2. Did plaintiff suffer emotional distress as the proximate result of the denial of his bumping rights?

Following remand in July, 1986, plaintiff moved on Febraury 26, 1987, to set a date for further trial. Following extensive briefing, this court on Septemgber 27, 1987, made an order defining the manner of proceeding for the resolution of issues pursuant to remand, and the matter came on for hearing on June 9, 1988. On September 13, 1988, this court filed its order determining that plaintiff is entitled to judgment on the issues of whether he would not have exercised his bumping rights and whether he sustained emotional distress as a proximate result of the defendant's denial of

plaintiff's right to procedural due process oflaw. Further trial was set on the issue of damages for November 8, 1988, and the matter actually proceeded on January 23, 1989. A decision was rendered on August 2, 1989. Subsequently, both sides moved for new trial, for additonal findngs and for alteration or amendment of judgment. Oral argument was heard on November 6, 1989.

The motions for new trial are DENIED. The motions to alter or amend judgment to amend findings and to make additional findings are GRANTED as follows:

1. Plaintiff's claim for damages now before the court does not arise from wrongful termination of plaintiff's employment with defendant. It has been previously determined that plaintiff's termination from employment was not wrongful. [Decision of July 23, 1982; Alexander v. Menlo Park, 787 F.2d 1371.]

Plaintiff's claim arises entirely from the failure of defendant to accord plaintiff the opportunity to bump into either of two positions, gym director or night clerk, and from

any damages to plaintiff proximately caused by emotional distress sustained by plaintiff and proximately resulting from the wrongful failure to accord plaintiff bumping rights. In other words, plaintiff is not entitled to recover damages for emotional distress occasioned by some occurrence or event other than the wrongful denial of bumping rights.

FINDINGS OF FACT

1. In its decision of July 28, 1983, this court did not reach the question of mitigation of damages, and that decision consequently made no finding on that issue.

2. Following its decision of July 23, 1982, this court granted plaintiff's motion for new trial, but on the issue of damages alone. Therefore, the decision of July 23, 1982 has no significance and does not constitute the law of the case on that issue.

3. Defendant City paid $4,056.00 to the State of California on account of plaintiff's unemployment, and plaintiff received that exact sum from the State of California as unemployment compensation.

4. Defendant did not establish by a preponderance of the evidence that plaintiff would not have taken the gym director position or the night clerk position if the opportunity to bump into those positions had been properly tendered to plaintiff.

5. Plaintiff did not receive bumping rights pursuant to Rule X, Section 3(D).

6. The testimony of plaintiff's expert T. Hensley Williams elicited on January 19, 1989 and appearing at RT 82:15 - 83:12 that where an employee is in a layoff mode and bumps into a lower positon, he or she can pretty much look forward to "some movement" within eighteen months to two years. By this Mr. Williams meant that if such an employee stayed on the job and did a good job in the job into which the employee bumped, possibilities of internal promotion or transfer within eighteen months to two years were enhanced. This testimony does not aid the court in fixing the applicable period of back wages at less than the entire period of initial unemplyment because in the instant case plaintiff was denied the very

advantage which constitutes the witness's predicate.

7. Plaintiff's loss of earnings as gym director between August 1, 1979 and April, 1983, is a sum equal to the product of the gym director salary times the number of months elapsing between August 1, 1979 and April 1983.

8. The amount of fringe benefits lost by plaintiff during the period between August 1, 1979 and April, 1983, is a sum equal to the salaries payable to gym director during that period times eighteen percentum.

9. The Judgment, entered April 25, 1990, amending Judgment dated August 4, 1989, has been computed as follows:

Back Pay from 8/8/79 through 3/31/83	$44,170	
Fringe Benefits (18%)	7,950	
		52,120
Pre-judgment interest through 3/31/83	10,349	
Pre-judgment interest from 4/1/83 to 8/4/89	44,933	55,282
Emotional Distress	10,000	
Consequent Medical Expenses	4,114.53	
Consequent Medical Expenses	960	
		15,074.53
		122,476.53

Plaintiff has been made whole by award of back pay from August 1, 1979 through March 31, 1983. Plaintiff's unemployment and alleged wage losses after March 31, 1983 were nto caused by and did not proximately result from the denial of bumping rights or other act of defendant, but rather from plaintiff's voluntary resignation from his East Palo Alto job.

The equities of the present case require computation of pre-judgment interest according to the 52 week Treasury Bill rates used in the Alternative Method in the Amended Declaration of Paul J. De Gregorio, i.e. the midpoint rates of the six fiscal years from April 1, 1983 to April 1, 1989 and the midpoint rate of the four month period from April 1, 1989 to August 4, 1989, rather than the 52 week Treasury Bill rates in effect during the back pay period. Fifty-two week Treasury Bill rates were on the average much higher during the back pay period than during the following six years four months to the entry of the August 4, 1989 judgment. The Alternative Method is necessary to avoid inequitable pre-judgment interest in the present

case, the interest rate in effect from April 1, 1983 to and including August 4, 1989 were significantly less than those in effect during the period for which back pay is awarded, and it appears to the court that it would be inequitable to compute interest in any other manner.

10. Plaintiff is entitled to a judgment in an amount equal to the sum of back pay, loss of fringe benefits and pre-judgment interest calculated in a manner consistent with findings 7, 8 and 9.

11. On the issue of mitigation of damages, the defendant City has the burden of proof.

12. Defendant City has failed to sustain its burden of proof.

13. Defendant City offered in evidence, through Yolanda Irigon, a compilation of jobs which were advertised in the public press falling within four general categories:

A. Youth Development-Counselling. (Book A)

B. Employment Placement and Counselling. (Book B)

C. Community Service. (Book C)

D. Recreation. (Book D)

14. Defendant offered the testimony of Robert L. Knowdell, a vocational consultant and career counsellor, who testified as an expert with respect to the qualifications of plaintiff as revealed in his resumes for positions advertised in Books A, B, C and D, and with respect to plaintiff's lack of qualification as revealed in his resume for many of the jobs for which plaintiff applied. Knowdell testified on May 5, 1983. His testimony is contained in RT Vol. 8, pages 763 - 787; 796 - 858.

15. In assessing plaintiff's qualifications for particular jobs or plaintiff's lack of qualification, Knowdell relied on plaintiff's resume covering the pertinent time period and the job description or advertisement, if any, for the particular job under consideration.

16. In evaluating plaintiff's qualifications for the jobs for which plaintiff applied, in many cases Knowdell opined based upon his own belief with respect to the

availability with the particular employer of jobs for one of plaintiff's background and experience.

17. Knowdell testified that based upon plaintiff's resume, he would not believe plantiff to be qualified for the position which plaintiff ultimately got, that of General Manager/Superintendent of the Ravenswood Recreation and Parks District.

18. Knowdell stated that plaintiff may have had personal qualities, course work and/or experience which were not revealed in his resume and which may have rendered him qualified for positions.

19. Plaintiff testified with respect to his job hunting activities, stating that over the period between his leaving his employment with defenfant City and his subsequent employment with the Ravenswood Recreation and Parks District, he devoted 8 - 10 hours per week to his job seeking activities: Plaintiff offered evidence of more than thirty job applications filed by him, stating that he was a "finalist" for two of the jobs, and was

successful ultimately in obtaining a job.

20. Plaintiffs choice of job - openings for which he applied, many of which were at a leval equal to or higher than plaintiff's last position with defendant City is reasonable.

21. During his period of unemployment, plaintiff improved his skills and qualifications by obtainingg a teaching certificate and completing work which resulted in the award to plaintiff of a Master of Arts Degree.

22. Robert Hall, an expert witness called by plaintiff testified that plaintiff's job seeking eforts over a three and one-half year period were more diligent than those normally demonstrated.

23. Plaintiff performed creditably in his position with the Ravenswood Recreation and Parks District, and left that position voluntarily for reasons which do not appear to the court to be causally related to a denial of procedural due process.

24. Plaintif stated as a reason for his resignation from the Ravenswood job was a decision of this court and plaintiff's inability

to have contact with officials of defendant City, as he was required to do in the Ravenswood job.

25. Following his resignation from the Ravenswood job, plaintiff had no further employment, except for consulting work which he performed in 1986 for Bayshore Employment Service and for the City of East Palo Alto.

26. Plaintiff has sustained emotional distress as a direct and proximate result of the failure of defendant City to offer his bumping rights.

29. Dr. Wendell P. Lipscomb testified:

A. "...(T)here was a very violent reaction to the fact that he did not know what his rights were and they were not offered to him. And this is very, very traumatic and shocking to him."

Q. When you were looking at the event that really constituted the trauma, the initial original trauma that really set him off, was that the actual event?

A. The actual event was the initial having the job rubbed out and being fired.

Q. And that occurred at the same time as not being offered bumping rights and thrown out in the street are you aware of that?

A. I have assumed that yes. I haven't seen it but ....

Q. And is that event of therefore not being offered bumping rights and being thrown out in the street important in your analysis....

A. Yes.

Q. ... of his emotional distress?

A. Yes.

28. Dr. Campbell testified:

Q. Do you believe he has suffered any emotional distress as a result of his being terminated from employment by Menlo Park without being offered his due process bumping rights?

A. Yes I do.

Dr. Campbell testified that the factors of the diagnosis were:

1. What plaintiff considered to be the wrongful termination of his job.

2. Plaintiff's failure to receive due process after termination.

3. The results of his litigation.

Dr. Campbell testified that when plaintiff discovered that he had failed to receive the due process which he thought was guaranteed to him, his major problems began. Dr. Campbell feels that plaintiff is obsessed with all that happened to him incident to the termination of his employment with defendant City including denial of his bumping rights.

29. There is no evidence tending to show that plaintiff sustained no emotional distress as a result of the loss of his bumping rights.

30. The evidence, taken as a whole, supports the inference that plaintiff sustained emotional distress as a result of being terminated from his employment with defendant City, as a result of being denied his bumping rights, as a result of news stories published in the press and as a result of various court decisions incident to the trial of this action. Only the loss of bumping rights gives rise to a compensable injury in this case. Alexander v. Menlo Park, 787 F.2d 1271.

31. The court must apportion any sum

awarded as damages for emotional distress proximately caused by the denial of procedural due process to reflect the relative causal impact of the failure to tender bumping rights and that of other factors such as abolition of plantiff's class 39.5 job, his termination of employment by defendant City, allegedly derogatory articles in the press concerning plantiff, and plaintiff's reaction to adverse judicial decisions in this case by this and other courts.

32. The court finds that the relative causal force of each of the above is:

Termination of employment - 60%;

Reaction to publicity and judicial decisions - 30%; and

Loss of bumping rights - 10%.

33. The court finds that plaintiff is entitled to the sum of $10,000 as general damages for emotional distress.

34. Plaintiff is entitled to special damages for expenses and bills incurred for medical and psychological treatment necessarily and reasonably incurred and as a proximate

result of the due process violation in the amount of $4,114.53, and to an additional sum for medical and psychological treatment reasonably expected to be incurred in the future in the sum of $960,00.

35. Plaintiff is entitled to an award of reasonable attorneys fees pursuant to 42 U.S.C. § 1988. The amount of reasonable attorneys fees has been determined by agreement of the parties.

CONCLUSION OF LAW

1. This court has jurisdiction of this cause pursuant to the provisions of 28 U.S.C. § 1343 and of 42 U.S.C. § 1983.

2. There is no dispute between the parties as to jurisdiction or venue.

3. Plaintiff has prvoen his claim that he was denied procedural due process of law by defendant City by reason of defendant City's non-compliance with its duly adopted Personnel Rules which required that plaintiff be accorded bumping rights upon layoff.

4. Defendant has not proven by a

preponderance of the evidence that plaintiff would not have exercised his bumping rights if the same had been accorded to him in accordance with the Personnel Rules, specifically Personnel Rule X, Subdivision 3D. Defendant has the burden of proof upon that issue. Alexander v. City of Menlo Park, 787 F.2d 1371.

5. Failure to offer bumping rights in accordance with defendant City's Personnel Rules is a violation of procedural due process for which plaintif is entitled to recover damages under 42 U.S.C. § 1983. The deprivation of bumping rights proximately caused plaintiff to lose the income and benefits of the position of gym director, which was the best paid of the two positions into which plaintiff could have bumped, from August 1, 1979 until April 1, 1983. That deprivation is within the purview and purpose of 42 U.S.C. § 1983, and is compensable in damages. Carey v. Piphus, 435 U.S. 247 (1977).

6. Defendant has the burden of proof on the issue of mitigation of damages. Sias v. City Demonstration Agency, 588 F.2d 692 (9th

Cir. 1978).

7. Defendnat has failed to sustain its burden of proof on the issue of mitigation of damages.

8. Plaintiff is entitled to prejudgment interst on the sums awarded herein as compensatory damages for lost wages and benefits. Cf. Ford v. Alfaro, 785 F.2d 835 (9th Cir. 1986).

9. Mental and emotional suffering caused by denial of procedural due process is compensable in damages. Carey v. Piphus, 435 U.S. 247 (1978); Dykes v. Hoseman, 743 F.2d 1488, 1500 (11th Cir. 1984) on reh'g, 776 942, on remand, 783 F.2d 1000.

10. Where emotional distress is proximately caused by several acts or omissions some of which are compensable and some of which are not, the trier of fact may apportion the damages according to the relative percentage of repsonsibility of a particular tort feasor. Mairena v. Foti, 816 F.2d 1061 (5th Cir. 1987); Wilson v. Taylor, 658 F.2d 1021 (5th Cir. Unit B. 1981), appeal after remand, 733 F.2d 1539

(11th Cir. 1984).

11. A plaintiff complaining of denial of procedural due process may only recover damages proximately caused by such a denial. Carey v. Piphus, 435 U.S. 247; Wilson v. Taylor, 733 F.2d 1539.

12. Unemployment insurance payments to plaintiff are not deductible from plaintiff's damages. Restatement 2d Torts, Section 920(A)(2) (1979); National Labor Relations Board v. Gullet Gin Co., 340 U.S. 361 (1951).

13. Plaintiff is entitled to judgment against the defendant City in a total sum equal to that derived as set forth in Findings of Fact numbered 7, 8, or 9, plus the sums set forth in Findings numbered 33 and 34. The claims of plaintiff and his attorneys for attorneys fees, court costs, and litigation costs have been settled by two separate stipulations filed herein and defendant has been or is hereby ordered to pay plaintiff and his attorneys in accordance with said stipulations. There is a stipulation for payment of $4,000 by defendant directly to Robert Alexander and defendant has

been or is hereby ordered to pay said sum of $4,000 to Robert Alexander in accordance with this stipulation. The sum is in addition to the judgment amount of $122,476.53.

14. Unemployment and wage losses after March 31, 1983 proximately resulted from plaintiff's voluntary resignation from his East Palo Alto job and not from denial of bumping rights or any act of defendant. As a result, plaintiff is not entitled to (a) reinstatement, (b) any award for back, front or future pay or wage losses for any period after March 31, 1983, whether in lieu of reinstatement or otherwise, or (c) any award for vocational training whether in lieu of reinstatement or otherwise.

15. Plaintiff has not presented evidence showing his entitlement to the expungement of any records relating to his employment by the City of Menlo Park.

16. The Memorandum of Decision filed August 2, 1989, including the findings and conclusions contained therein, shall remain in effect except as altered or modified by these Findings and Conclusions, and the Amended

Judgment entered April 25, 1990.

17. In assessing the amount of an award of pre-judgment interest a trial judge is entitled to adopt a rate of interest required by the equities of the case and to vary the rate prescribed in 28 U.S.C. Section 1961(a) where substantial evidence of inequity requires it.

Ford v. Alfaro
785 F.2d 885 (9th Cir. 1986)

Western Pacific Fisheries, Inc. v. SS President Grant
730 F.2d 1280 (9th Cir. 1984)

The undersigned judge has presided over the instant case for ten years. It is this court's view that defendant should not be required to pay a rate of interest consistent with the general rates prevailing during the compensable period for the 6.3 years since that period closed. It is the court's view that plaintiff is entitled to interest at the prevailing rate at all periods of this protracted litigation. Defendant has not disproportionately contributed to delay in the course of this litigation, and that conclusion is amply supported by a review of all filings in the case.

Let judgment be entered accordingly.

DATED: July 20, 1990.

WILLIAM A. INGRAM
United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT ALEXANDER,

Plaintiff,

v.

CITY OF MENLO PARK,

Defendant.

/

No. C-80-4369-WAI

AMENDED ORDER

FILED AUG 1, 1990

The Stay of the Judgment entered April 25, 1990 amending judgment entered August 4, 1989 is dissolved and the judgment entered April 25, 1990 is reaffirmed as the Final Judgment herein.

The Findings of Fact and Conclusions of Law dated July 20, 1990 are intended to supercede in all respects Findings and Amended Findings filed March 29, 1990 and May 7, 1990 respectively.

DATED: August 1, 1990.

WILLIAM A. INGRAM
United States District Judge

42 U.S.C. SECTION 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by tthe Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. SECTION 1961

(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.

(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually.

(c)(1) This section shall not apply in any

judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at the underpayment rate or overpayment rate (whichever is appropriate) established under section 6621 of the Internal Revenue Code of 1954 [26 U.S.C.A. Section 6621].)

(2) Except as otherwsise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal circuit, at the rate provided in subsection (a) and as provided in subsection (b).

(3) Interest shall be allowed, computed, and paid on judgments of the United States Claims Court only as provided in paragraph (1) of this subsection or in any other provision of law.

(4) This section shall not be construed to affect the interest on any judgment of any court not specified in this section.

RELEVANT PERSONNEL RULES OF CITY OF MENLO PARK

The following are relevant personnel rules of the City of Menlo Park applicable to the instant case:

RULE V

PROBATION

Section 1. Definition: The probationary period shall be regarded as a part of the testing process and shall be utilized for closely observing the employee's work, for secruing the most effective adjustment of a new employee to a prospective position and for rejecting any probationary employee whose performance is not satsifactory.

Section 2. Probationary Period: All original and promotional appointments shall be tentative and subject to a probationary period of six (6) months for miscellaneous employees and twelve (12) months for Police Officers. At least one (1) month prior to permanent appointment, the Personnel Officer may extend the probationary period not to exceed six (6) months if good cause exists therefore. "Good cause" as used herein is defined to include, but

not limited to, failure to satisfactorily perform necessary job functions or inability to observe the employee during the probationary period due to the employee's illness or disability or the employee's absence for any other reason.

Section 3. Satisfactory Completion: Upon satisfactory completion of the probationary period, the Personnel Officer shall file with the employee a statement in writing to such effect and stating that appointment to the permanent position is thereby completed.

Section 4. Unsatisfactory Probation: If the service of a probationary employee is not satisfactory, the probationary employee will be notified in writing that he/she has been rejected for the permanent position. Said notice shall contain the reasons for rejection. The rejected probationary employee may review said reasons and any supporting documentatoin with the Personnel Officer, but shall not be entitled to pursue the grievance procedure or otherwise be entitled to a hearing.

An employee deemed unsatisfactory for a

position shall return to prior classification and non-probationary status in that classification to the pay step he/she would have had if not promoted.

RULE VII

TRAINING OF EMPLOYEES

Section 1. Responsibility for Training: Responsibility for developing training programs for employees shall be assumed jointly by the City Council, the Personnel Officer, and department heads. An Employee Development Committee may be formed to assist in this responsibility. Such training programs may include lecture courses, demonstrations, assignment of reading matter, or such other devices as may be available for the purpose of improving the efficiency and broadening the knowledge of municipal officers and employees in the performance of their respective duties. Training will be provided in compliance with the City's Affirmative Action plan and Employee Development Policy in existence at that time.

Section 2. Credit for Training: Participation in and successful completion of

special training courses may be considered in making advancements and promotions. To encourage such additional education or job training, expenses and/or tuition may be paid the City, when approved in advance.

RULE VIII

REPORTS AND RECORDS

Section 1. Records: The Personnel Officer shall maintain Personnel records for each employee in the service of the City showing the name, title of position held, the department to which assigned, salary, changes in employment status, attendance records and other such information as may be considered pertinent.

Personnel files of individual employees are confidential information and shall be used or exhibited only for administrative purposes or in connection with official proceedings before the City Council. However, any employee may examine his/her own file at any reasonable time with the exception of information obtained confidentially in response to reference inquiries.

No information of any kind shall be placed in the individual employee personnel file

without simultaneous notification of its complete content to the employee concerned.

Section 2. Change of Status Report: Every appointment, transfer, promotion, demotion, change of salary rate, and any other temporary or permanent change in status of employees shall be reported in writing to the Personnel Officer in such manner as may be prescribed by him/her.

Section 3. Performance Appraisals: Performance appraisals shall be done at least twice during the probation period, and at least annually thereafter. Performance appraisal shall be done by employee's supervisor or department head in consultation with the employee, but not in conjunction with merit increase evaluations.

Section 4. Destruction of Records: All personnel records of City employees shall be kept indefinitely. All other records may be destroyed in accordance with the City's Records Management Ordinance.

RULE IX

CHANGES IN EMPLOYMENT STATUS

Section 1. Transfer: After notice to the

Personnel Officer, an employee may be transferred by the appointing power at any time from one position to another position in the same or comparable class. If the transfer involves a change from the jurisdiction of one supervising official to another, both must consent thereto unless the City Council orders the transfer for purposes of economy or efficiency. Transfer shall not be used to effect a promotion, demotion, advancement, or reduction; each of which may be accomplished only as provided in the Personnel Ordinance and in these rules. No person shall be transferred to a positoin for which he/she does not possess the minimum qualifications.

Section 2. Promotion: Insofar as it is consistent with the best interest of the service, all vacancies in the competitive service shall be filled by promotion from within the competitive service, after a promotional test has been given and a promotional list established. It shall be incumbent on the Personnel Officer, however, to evaluate the position and the prospective merit system

candidates to see if the competitive service will be strengthened by a closed promotional examination, and the Affirmative Action Plan complied with. If in the opinion of the Personnel Officer, a vacancy could be filled better by an open competitive test instead of a closed promotional test, then the Personnel Officer may call for applications for the vacancy and arrange for an open competitive test and for the preparation and certification of an eligible list.

Section 3. Demotion: A department head may designate for demotion an employee whose ability to perform his required duties falls below standards required by the department head or who has committed a breach of discipline.

Any employee who has been designated for demotion shall be entitled to receive a written statement of the reasons, and a hearing as provided in Rule XI of these rules.

Upon request of the employee, and with consent of the prospective supervising official, demotion may be made to a vacant position as a substitution for layoff. No employee shall be

demoted to a position for which he/she does not possess the minimum qualifications.

RULE X

SEPARATION FROM SERVICE

Section 1. Temporary Suspension: Department heads may suspend employees up to three (3) days without pay for disciplinary reasons. Continuation beyond three (3) days can be authorized only by the Personnel Officer.

Section 2. Discharge: The department head may designate for discharge any employee at any time for the following reasons:

a) Employee's failure or inability to perform duties required by management for the particular position or to conform to required policies of the City.

b) Employee's breach of discipline or violation of legal obligations.

c) Fraud--false statement of material fact or actual or attempted deception.

Whenever it is the intention of the department head to discharge any employee, the Personnel

Officer may first enter an order for suspension without pay. Any employee who has been designated for discharge shall receive a written statement of the reasons for such actions and a hearing as provided for in Rule XI. The period of suspension shall extend until the time a decision is made by the Personnel Officer as provided for in Rule XI. The Personnel Officer may, if appropriate, direct suspension for a period up to six (6) months in lieu of discharge.

Section 3. Layoffs: (A) City Council retains authority to abolish positions, organize and reorganize city department and determine organizational needs. In the event that the City eliminates or reduces a particular classification within a city department and the layoff of any employee(s) will result therefrom, layoffs will be made in accordance with these rules, and in the following order:

1) Temporary: For the limited purposes of this section "Layoffs", temporary employees are defined as employees hired for a definite term;

2) Part-time: For the limited purposes of

this section, part-time employees are defined as employees hired to work less than thirty (30) hours per week and, during their employment, have actually worked less than 2,000 total hours;

3) Police reserves and any other employees not otherwise described herein;

4) Probationary: For the limited purposes of this section "Layoffs", probationary employees are defined as employees who have not yet completed the probationary period, or any extension(s) thereof, as provided in these rules;

5) Permanent: For the limited purposes of this section, permanent employees are defined as employees hired to work thirty (30) hours per week or more or employees who, during their employment, have actually worked 2,000 or more total hours.

Layoffs in each of the foregoing subcategories will be exhausted within a department before layoffs will occur in the following subcategory in that department.

B) Except as provided for hereinafter, layoffs

will be made in reverse order of seniority. Those employees with the least time served in a classification shall be laid off first, with ensuing layoffs occurring in reverse order of length of service in classification.

1) If two employees have served the same time in classification, then, as between those two employees, the layoff will be based on total time of service with the City. If total time of service with the City is the same, then, as between those two employees, the layoff will be based on performance ratings, and the needs of the department, as determined by the City.

2) Length of service shall be determined by computing total continous service starting from the first day of service in a classification or, if necessary, the first day of service with the City. Up to three (3) months a year spent on involuntary military leave and job related educational leave shall be included. For employees working less than full time, hours shall be converted into days worked for purposes of determining length of service.

3) For any employee retreating within a

department, seniority shall be computed as length of service in the classification to which the employee is retreating, plus any time served in any previously held higher classifications in that department; for any employee retreating from one department to another, seniority shall be computed in total length of service with the City.

C) Layoffs will not occur in reverse order of seniority in the following circumstances:

1) When the Department Head and City Manager determine that laying off an employee with special skills will impede or impair the operation of the department, then the Department Head and City Manager may designate the next most senior employee.

D) Permanent employees and employees on probation following promotion designated for layoff shall have the following options:

1) To displace a less senior employee in a position with the City which the more senior employee formerly held and which the more senior employee is qualified to occupy in the judgment of the department head;

2) To displace a less senior employee in the same department who occupies a positoin which the more senior employee is qualified to occupy in the judgment of the department head;

3) To take a voluntary demotion within the department to a position which the employee is qualified to occupy in the judgment of the department head, thereby displacing an employee in that position having less seniority.

E) A retreating employee has a right to be retained in the highest salary range possible which is equal to or less than his or her present salary range. An employee involved in layoff may not retreat to a step with higher salary. However, nothing in this section shall be construed as to prohibit an employee from applying for a position in a higher classification.

F) The names of all eemployees laid off shall be placed on a re-employment eligiblity list for City wide positions, and such list shall have preference over any other employment list. This list shall remain in effect for two (2) years from date of layoff. Former employees with the

most seniority will be entitled to preference in their former department or classification providing they meet the qualifications and performance standards. For position in other City departments, former employees will be considered first with due consideration for qualification and prior performance.

G) Permanent employees and employees on probation following promotion who are laid off shall be entitled to two (2) weeks severance pay plus having their names placed on the re-employment eligibility list.

H) Former employees appointed from a re-employment eligibility list shall be restored all rights accrued prior to being laid off, such as frozen sick leave, vacation accrual rate and credit for years of service, except for any benefits for which they received compensation at the time of or subsequent to the date of layoff; provided, severance pay shall not be repaid.

I) Employees designated for layoff shall be given at least fifteen (15) days advance written notice from the Personnel Officer.

RULE XI

APPEALS AND HEARINGS

Section 1. Notices: Prior to reprimand, suspension, demotion or discharge, any permanent employee in the competitive service who has been designated for reprimand, suspension, demotion or discharge shall be given a written statement of the reasons for such action. The employee may, within five (5) days after the receipt of the statement, file a written reply thereto. The written statement and any reply thereto shall be filed with the City Manager. The employee may waive the right to receive the written statement. Any such waiver shall be in writing. Thereafter the employee shall meet with the Personnel Officer; such meeting shall take place no sooner than five (5) days after the written statement (or waiver thereof) has been given; at least five (5) days written notice of such meeting shall be given to the employee. The decision of the Personnel Officer relative to reprimand, suspension, demotion or discharge shall be made only after such meeting.

Section 2. Method of Appeal: Any

permanent employee in the competitive service who has been formally reprimanded, suspended, demoted or discharged shall be entitled to pursue the following

a) Within ten (10) days of the above described action, said employee shall initiate the appeal procedure by filing with the Personnel Officer a written statement, describing all facts deemed material thereto, including the grounds therefore;

b) Within five (5) days of filing said written appeal, the employee shall meet confidentially with his/her immediate supervisor to attempt to adjust the matter;

c) Within five (5) days of being notificed by the immediate supervisor of his/her disposition, if dissatisfied the employee shall meet confidentially with the department head;

d) Within five (5) days of being notified by the department head of his/her disposition of the matter, if dissatisfied, the employee shall meet confidentially with the Personnel Officer;

e) Within five (5) days of being notified by the Personnel Officer of his/her disposition

of the matter, if dissatisfied, the employee shall file a written request with the Personnel Officer for a hearing and shall designate that said hearing shall be conducted by the Personnel Board of a hearing officer selected with the concurrence of the City and the employee;

f) Within ten (10) days fo the decision by the Personnel Board of hearing officer, either the employee or the City may appeal in writing to the City Council. The City Council shall examine the record and may affirm, modify or reverse the decision or may remand the matter to the appropriate decision making body with instructions. There shall be no hearing before the City Council, or any evidence introduced before it.

g) The provisions of California Code of Civil Procedure Section 1094.6 shall apply to judicial review of all actions taken under these rules.

Section 3. Grievance Procedures: Any employee having a complaint about working conditions shall be entitled to pursue the foregoing grievance procedure through Section

2(d) but shall have no right to proceed with any subsequent step of the appeal procedure. The decision of the Personnel Officer shall be final and shall not be reviewable in court more than ninety (90) days from the date of such decision.

Section 4. NOTE: As used in Rule XI, the word "days" shall be construed to mean days that the City Hall of the City of Menlo Park is open for public business.